ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ENDURING POWERS OF ATTORNEY

Report for Discussion No. 7

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The Institute's office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 492-5291; fax (403) 492-1790.

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ACKNOWLEDGEMENTS

This report represents the first of a two part review of the decision making process for persons who are not capable of managing their own affairs. The second part will examine the aproaches that may be taken to decisions on matters other than financial management.

This project relies heavily on two factors. The financing for the study has been provided by the Alberta Law Foundation from its Special Projects Initiative and the Institute gratefully acknowledges the ongoing and special support which the Foundation provides. The subject matter expertise for the study has been provided by Professor Gerald B. Robertson whose knowledge and analytical ability have been essential to the consultative process and the writing of the report. The quality of the report and the speed with which it has been produced are cogent evidence of those skills. The Institute is fortunate to have secured Professor Robertson's services.

PREFACE AND INVITATION TO COMMENT

This is not a final report. It is a report of our conclusions and proposals accompanied by draft legislation. The Institute's purpose in issuing a Report for Discussion at this time is to allow interested persons the opportunity to consider these tentative conclusions and proposals and to make their views known to the Institute. Any comments sent to the Institute will be considered when the Institute determines what final recommendation, if any, it will make to the Alberta Attorney-General.

The reader's attention is drawn to the Summary of Recommendations in Part III. It would be helpful if comments would refer to these recommendations where practicable, but commentators should feel free to address any issues as they see fit.

It is just as important for interested persons to advise the Institute that they approve the proposals and the draft legislation as it is to advise the Institute that they object to them, or that they believe that they need to be revised in whole or in part. The Institute often substantially revises tentative conclusions as a result of comments it receives. Neither the proposals nor the draft legislation have the final approval of the Institute's Board of Directors. They have not been adopted, even provisionally, by the Alberta government.

Comments on this report should be in the Institute's hands by September 1, 1990. Comments in writing are preferred.

REPORT FOR DISCUSSION ON ENDURING POWERS OF ATTORNEY

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TABLE OF ABBREVIATED REFERENCES

1. Law Reform Reports and Papers

Abbreviation	Reference
Australian Discussion Paper	Australian Law Reform Commission, *Enduring Powers of Attorney* (Discussion Paper No. 33, 1987)
Australian Report	Australian Law Reform Commission, *Enduring Powers of Attorney* (Report No. 47, 1988)
B.C. Report	Law Reform Commission of British Columbia, *Law of Agency, Part 2: Powers of Attorney and Mental Incapacity* (Report No. 22, 1975)
B.C. Working Paper	Law Reform Commission of British Columbia, *The Enduring Power of Attorney: Fine-Tuning the Concept* (Working Paper No. 62, 1989)
California Report	California Law Revision Commission, *Tentative Recommendation Relating to Uniform Statutory Form Power of Attorney Act* (1989)
English Report	English Law Commission, *The Incapacitated Principal* (Report No. 122, 1983)
English Working Paper	English Law Commission, *The Incapacitated Principal* (Working Paper No. 69, 1976)
Irish Report	Law Reform Commission of the Republic of Ireland, *Land Law and Conveyancing Law: (2) Enduring Powers of Attorney* (Report No. 31, 1989)
Manitoba Report	Manitoba Law Reform Commission, *Special, Enduring Powers of Attorney* (Report No. 14, 1974)
Newfoundland Report	Newfoundland Law Reform Commission, *Enduring Powers of Attorney* (Report No. 2, 1988)
Newfoundland Working Paper	Newfoundland Law Reform Commission, *Powers of Attorney* (Working Paper No. 2, 1987)
New York Report	New York Law Revision Commission, *Memorandum Relating to Springing Powers of Attorney*, Annual Report for 1988, 229-278 (Document No. 65, 1988)

Abbreviation	Reference
N.S.W. Report	New South Wales Law Reform Commission, *Powers of Attorney and Unsoundness of Body or Mind* (Report No. 20, 1975)
N.S.W. Working Paper	New South Wales Law Reform Commission, *Powers of Attorney* (Working Paper, 1973)
Ontario Report	Ontario Law Reform Commission, *Report on Powers of Attorney* (1972)
South African Report	South African Law Commission, *Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons* (1988)
South Australia Report	Law Reform Committee of South Australia, *Powers of Attorney* (Report No. 47, 1981)
Tasmania Report	Law Reform Commission of Tasmania, *Powers of Attorney* (Report No. 39, 1984)
Tasmania Working Paper	Law Reform Commission of Tasmania, *The Law Relating to Powers of Attorney* (Working Paper No. 83/4, 1983)

2. Legislation (Canada)

B.C. Act	*Power of Attorney Act*, R.S.B.C. 1979, c. 334 ([am. 1987, c. 42, ss. 90-92; in force Oct. 14, 1987, Reg. 371/87]
Manitoba Act	*Powers of Attorney Act*, S.M. 1980, c. 4 [now R.S.M. 1987, c. P97]
New Brunswick Act	*Property Act*, R.S.N.B. 1973, c. P19, ss. 58.1-58.7 [en. 1987, c. 44, s. 1; in force Feb. 15, 1988, Gaz. Jan. 27, 1988]
Nova Scotia Act	*Powers of Attorney Act*, S.N.S. 1988, c. 17
Ontario Act	*Powers of Attorney Act*, R.S.O. 1980, c. 386 [am. 1983, c. 74; 1986, c. 49; 1986, c. 64, s. 54]
P.E.I. Act	*Powers of Attorney Act*, S.P.E.I. 1988, c. 51

Abbreviation	Reference
Saskatchewan Act	*Powers of Attorney Act*, S.S. 1982-83, c. P-20.1
U.L.C.C. Act	Uniform Law Conference of Canada, *Uniform Powers of Attorney Act* (1978)

3. Legislation (Other Jurisdictions)

English Act	*Enduring Powers of Attorney Act* 1985, c. 29 (England)
N. Ireland Order	Enduring Powers of Attorney (Northern Ireland) Order 1987, SI 1987/1627 (NI 16) [in force April 10, 1989, SI 1989/63] (Northern Ireland)
N.S.W. Act	*Conveyancing Act* 1919, as amended by the *Conveyancing (Powers of Attorney) Amendment Act* 1983, No. 26 (New South Wales)
N. Territory Act	*Powers of Attorney Act* 1980, No. 25 [in force Jan. 28, 1983, Gaz. Jan. 28, 1983] [am. 1988, No. 42] (Northern Territory of Australia)
New Zealand Act	*Protection of Personal and Property Rights Act* 1988, No. 4 (New Zealand)
South Australia Act	*Powers of Attorney and Agency Act* 1984, No. 25 [am. 1988, No. 80] (South Australia)
Tasmania Act	*Powers of Attorney Act* 1934, as amended by the *Powers of Attorney Amendment Act* 1987, No. 87 (Tasmania)
Uniform D.P.A. Act	National Conference of Commissioners on Uniform State Laws, *Uniform Durable Power of Attorney Act* (1979) (United States)
Uniform Act 1988	National Conference of Commissioners on Uniform State Laws, *Uniform Statutory Form Power of Attorney Act* (1988) (United States)
Victoria Act	*Instruments Act* 1958, as amended by the *Instruments (Enduring Powers of Attorney) Act* 1981, No. 9691 (Victoria)

PART I - EXECUTIVE SUMMARY

The Need for Reform

The loss of capacity to manage their own affairs is a fact of life for a growing number of Albertans. Chronic and degenerative illnesses are becoming common. In many cases, such as Alzheimer's disease, the onset of incapacity may be gradual. The sufferer, while still competent, realizes that incapacity is likely or even imminent. Many people faced with this situation would welcome the opportunity to plan for the future management of their affairs.

Often, people who realize that their mental faculties are beginning to fail would like to grant a power of attorney to a family member or trusted advisor, expecting that the attorney will manage their financial affairs when they are mentally incapable of doing so themselves. A power of attorney is a form of agency, by which one person (the donor) authorizes another (the attorney) to act on his or her behalf.

However, presently the law in Alberta does not allow this to be done. At common law a power of attorney terminates on the mental incapacity of the donor. (The only exception is an irrevocable power of attorney, which is given to secure a proprietary interest of the attorney.) The rule applies no matter how clearly the donor indicates the intention that the power of attorney should continue despite his or her incapacity. Family members may choose to manage the estate notwithstanding they lack lawful authority. In doing so, they expose themselves to potential personal liability. Agents who act after their authority has been terminated by the principal's mental incapacity are personally liable to third parties, even if the agent is unaware of the principal's incapacity. (The authority for this is the 1910 English Court of Appeal case, *Yonge* v. *Toynbee*.)

Report for Discussion No. 7, *Enduring Powers of Attorney*, was prepared for the Alberta Law Reform Institute by Professor Gerald Robertson. The Report concludes that the common law rule is unsatisfactory and that legislation should be introduced to provide for powers of attorney which endure notwithstanding the incapacity of the donor ("enduring powers of attorney" (EPAs)). The Report's 43 recommendations address the safeguards required, the powers and duties of the attorney, the commencement and termination of enduring powers of attorney, and the protection of attorneys and third parties. A draft *Power of Attorney Act* and a draft *Dependent Adults Amendment Act* are included.

Most provinces and many other countries have enduring power of attorney legislation. Research for the Report focused on the relevant legislation in other jurisdictions and on the reports and working papers of other law reform agencies. The

Institute also consulted with individuals and organizations in other jurisdictions, in order to benefit from their experience with EPA legislation.

Advantages of Enduring Powers of Attorney

EPAs provide a simple, straightforward means of enabling people to plan for their own incapacity. Granting a power of attorney seems ideal for the person who anticipates becoming unable to manage his or her own affairs. It is illogical and unacceptable that the law revokes the attorney's authority at the very point when it is most needed. An EPA enables people to plan for their own incapacity, giving them a sense of control which promotes autonomy and enhances personal dignity.

Alternatives which are presently available in Alberta are limited or undesirable. For instance, the *Dependent Adults Act* is a model for reform in the areas of guardianship and trusteeship, but it has disadvantages as a substitute for EPA legislation. The proceedings can be expensive and time consuming, and are often traumatic for the family and the person whose mental faculties are deteriorating, because he or she must be declared "incapable of making reasonable judgments".

Safeguards

EPAs do present an obvious potential for abuse. They can give attorney unlimited power over the donor's estate after the donor's incapacity. Experience in other jurisdictions indicates that the greatest concern is the danger of donors executing EPAs without fully understanding the implications of what they are doing. The problem most often is that the donor is uninformed, rather than mentally incompetent.

Effective safeguards are required, but they must avoid excessive formality and complexity which would result in EPAs being rarely used, or in inadvertent noncompliance when they are used. EPA safeguards must provide sufficient evidence that an EPA has been granted. They must protect the donor against fraud and undue influence, and they must ensure that donors understand the implications of the EPA. The legislation must also provide some mechanism for reviewing the attorney's conduct after the donor has become mentally incompetent.

The Report recommends that an EPA be in writing and signed by or under the direction of the donor (by someone other than the attorney, witness or their spouses), and witnessed by a lawyer. The EPA would state either that it is to continue notwithstanding the donor's later mental incapacity or infirmity, or that it is to take effect upon the donor's mental incapacity or infirmity. It would be accompanied by a certificate of legal advice signed by the lawyer who witnessed the EPA, which would state that the lawyer was satisfied that the donor appeared competent to grant the EPA, and understood the explanatory notes which would be included in the text of every EPA.

These formalities of execution are necessary to protect the interests of the donor, and the Report recommends that the donor should not be able to waive compliance with them.

The Report also recommends that an EPA is void if, at the date of its execution, the donor is incapable of understanding its nature and effect. A number of other safeguards were considered, including a minimum age for the donor, restrictions on who can be appointed as an attorney, mandatory joint attorneys, limitations on the value of the estate, and limitations on the duration of the EPA. It was decided that these safeguards would undesirably restrict the freedom of donors and would give rise to other problems.

Powers and Duties of the Attorney

The nature of an attorney's duties is well established in the common law. As with all agents, an attorney has a duty to exercise reasonable care when acting under the power of attorney. Attorneys also have a duty of loyalty and utmost good faith. They must keep their own property separate from the donor's, and must keep accurate accounts of all transactions entered into on the donor's behalf. They cannot delegate their authority without the consent of the donor.

Given that the nature and extent of an attorney's duties are already so well established in law, it is unnecessary to incorporate all of them into the proposed legislation. However, it is recommended that the duty to act and the duty to account be incorporated into the legislation.

At common law, an attorney does not have to exercise the authority conferred by the power of attorney unless he or she undertakes by contract to do so. The Report recommends that, upon the donor's incapacity, attorneys be required to exercise their powers with reasonable diligence to protect the interests of the donor. The duty should not be imposed unless the attorney has accepted the appointment as attorney by signing or acknowledging the EPA or by acting in pursuance of the EPA.

The attorney's common law duty to account to the donor is meaningless if the donor lacks the mental capacity either to make an informed decision whether to request the accounts, to understand them, or to revoke the power of attorney if the accounts indicate mismanagement. It is recommended that the court have the power, on the application of any interested party, to direct that the attorney provide an account of transactions entered into on behalf of the donor. The application could be brought only after the donor's incapacity, and notice would have to be served on the donor and the Public Trustee. The legislation would not allow a donor to waive the provisions for an accounting.

Presently, attorneys cannot use their powers to benefit anyone other than the donor, without the donor's informed consent. Lacking this power, an EPA would lose much of its potential usefulness. The Report recommends that, in the absence of limitations contained in the instrument creating the power, an attorney should be able to provide for the maintenance, education, benefit and advancement of the donor's spouse and dependent children. The proposed legislation makes it clear that attorneys may benefit themselves if they fall in the class of specified dependents.

Springing Powers

Ordinarily, an EPA confers immediate authority on the attorney. Sometimes this may reflect the needs of the donor, who (though having the mental capacity to grant a valid EPA) may be having difficulty managing his or her own affairs. Other donors will require a mechanism for postponing the attorney's authority until it is needed. Such EPAs, which take effect only upon the occurrence of a named contingency, are called "springing powers of attorney".

The Report recommends that the legislation should allow the donor to specify any contingency, including but not limited to mental incapacity or infirmity, upon which the EPA will take effect. Donors could specify a person (who could be anyone, including the attorney) who would conclusively determine when the contingency had occurred. The legislation should contain a default provision for EPAs which are contingent on the mental incapacity of the donor: if the power fails to name a person, or if the named person dies before it takes effect, the contingency should be deemed to have occurred upon the written declaration of two medical practitioners.

Termination

There is some evidence in other provinces that EPA donors often do not understand that they can revoke the power at any time before incapacity. The proposed legislation would contain an express provision that an EPA terminated if it is revoked by the donor, provided that the donor has the necessary mental capacity. The court would also have the power to terminate the EPA if it considers this to be in the best interests of the donor. This revocation by the court is one of the most fundamental and necessary safeguards which ought to be included in EPA legislation.

The application would be made to the Surrogate Court by the donor, any interested person, and any other person with leave of the court. Notice of the application would be served on the donor, the attorney, and the public trustee. The termination application is a quick and simple procedure, and is best suited to emergency situations, where the removal of the attorney is immediately necessary to protect the donor's interests.

The Report also makes recommendations relating to termination upon a trusteeship order being granted under the *Dependent Adults Act*, upon the death of the donor or the death or incapacity of the attorney (of the last remaining attorney, where joint or alternate attorneys were appointed), and upon the attorney's renunciation of the EPA. If the attorney is under a duty to act (as discussed above), he or she would not be able to renounce without leave of the court. A physicians' certificate of incapacity in respect of an EPA donor would be of no effect, but the Public Trustee could manage the estate until notified of the EPA.

For the protection of the donor, the statutory provisions relating to termination would apply notwithstanding any agreement or waiver to the contrary.

Protection of Attorneys and Third Persons

At common law, attorneys who act in good faith, without knowledge of the donor's incapacity, are held personally liable to the parties with whom they deal, because the incapacity terminates the attorneys' authority. They are liable even though the rights of these third parties are unaffected by the donor's incapacity. This rule is unfair and of questionable validity.

With EPA legislation, the donor's mental incapacity will not terminate the attorney's authority. However, the possibility of personal liability remains in cases where the power of attorney is not an enduring one. It is recommended that the proposed legislation provide that an attorney shall not incur any liability for having acted upon a power of attorney which had been terminated, if the attorney did not know, and with reasonable care would not have known, of the termination. The legislation should also provide that the attorney's act is valid and binding in favour of any person who did not know of the termination of the attorney's authority.

Conclusion

Copies of the Institute's 128-page report for discussion, *Enduring Powers of Attorney*, are available from the Institute. The report includes the draft legislation as well as more detail and commentary on the material covered in this summary. The Institute invites comments from individuals, community groups, and professionals regarding the proposed legislation.

PART II - REPORT FOR DISCUSSION

CHAPTER 1 - INTRODUCTION

A. History and Scope of the Project

This Report for Discussion represents the first phase of a two-part project relating to substitute decision-making and mental incapacity. The project developed from a proposal made to the Institute in 1988, which focused on powers of attorney in the context of financial planning. The initial proposal was to examine the advantages and problems associated with legislation providing for an "enduring" power of attorney, that is, one which continues after the mental incapacity of the donor.

The project was later expanded to include a second phase, which will examine alternative models for obtaining substitute consent to health care on behalf of mentally incompetent persons. One such model is the power of attorney for personal care, which has been adopted in New Zealand and in several parts of the United States. This model expands the power of attorney concept beyond its traditional financial context, and enables the attorney to make decisions in areas of personal care, including health care. Another possible model is commonly referred to as "living will" legislation. These and other models for decision-making in health care will form part of the second phase of the project. It is expected that the second phase will be completed by the end of 1990.

The project has been funded by a grant from the Alberta Law Foundation's Special Projects Fund.

B. Purpose of the Report

The purpose of this Report is to facilitate the introduction of legislation providing for enduring powers of attorney.

A power of attorney is a form of agency, in which one person (the donor) authorizes another (the attorney) to act on his or her behalf. People who realize that their mental faculties are beginning to fail, frequently wish to grant a power of attorney, usually to a family member, with the expectation that this will enable their financial affairs to be managed once they become mentally incapable of doing so themselves. However, under present law in Alberta this cannot be done. At common law a power of attorney terminates on the mental incapacity of the donor. This rule applies even if the donor intends that the power of attorney should continue notwithstanding his or her subsequent incapacity.

The Report concludes that the common law rule is unsatisfactory and that legislation should be introduced to provide for enduring powers of attorney. Recommendations are made as to (1) the safeguards which should be incorporated into the legislation, (2) the powers and duties of the attorney, (3) the commencement and termination of enduring powers of attorney, and (4) protection of attorneys and third parties.

Draft legislation is produced in Part IV of the Report.

C. Methodology

(1) Research

The research for this Report has focused primarily on the relevant legislation in other jurisdictions and on the reports and working papers of other law reform agencies. In Canada, enduring powers of attorney have been studied by law reform commissions in British Columbia,[1] Manitoba,[2] Ontario,[3] and Newfoundland,[4] and by the Uniform Law Conference of Canada.[5] We have also considered reports and working papers produced by law reform agencies in England,[6] South Australia,[7] the Australian Capital Territory,[8]

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[1] Law Reform Commission of British Columbia, *Law of Agency, Part 2: Powers of Attorney and Mental Incapacity* (Report No. 22, 1975) ("B.C. Report"); Law Reform Commission of British Columbia, *Powers of Attorney and Mental Incapacity* (Working Paper No. 12, 1974); Law Reform Commission of British Columbia, *The Enduring Power of Attorney: Fine-Tuning the Concept* (Working Paper No. 62, 1989) ("B.C. Working Paper").

[2] Manitoba Law Reform Commission, *Special, Enduring Powers of Attorney* (Report No. 14, 1974) ("Manitoba Report").

[3] Ontario Law Reform Commission, *Report on Powers of Attorney* (1972) ("Ontario Report").

[4] Newfoundland Law Reform Commission, *Enduring Powers of Attorney* (Report No. 2, 1988) ("Newfoundland Report"); Newfoundland Law Reform Commission, *Powers of Attorney* (Working Paper No. 2, 1987) ("Newfoundland Working Paper").

[5] Uniform Law Conference of Canada, *Proceedings of the 58th Annual Meeting* (1976) and *Proceedings of the 60th Annual Meeting* (1978).

[6] English Law Commission, *The Incapacitated Principal* (Report No. 122, 1983) ("English Report"); English Law Commission, *The Incapacitated Principal* (Working Paper No. 69, 1976) ("English Working Paper").

[7] Law Reform Committee of South Australia, *Powers of Attorney* (Report No. 47, 1981) ("South Australia Report").

New South Wales,[9] Tasmania,[10] New York,[11] California,[12] South Africa[13] and the Republic of Ireland.[14]

Most Canadian provinces, and many other countries, have enduring power of attorney legislation. In preparing this Report, we have examined the legislation in the following jurisdictions : British Columbia,[15] Saskatchewan,[16] Manitoba,[17] Ontario,[18] New Brunswick,[19] Nova Scotia,[20] Prince Edward Island,[21] England,[22] Northern Ireland,[23] New

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[5](...continued)

[8] Australian Law Reform Commission, *Enduring Powers of Attorney* (Report No. 47, 1988) ("Australian Report"); Australian Law Reform Commission, *Enduring Powers of Attorney* (Discussion Paper No. 33, 1987) ("Australian Discussion Paper").

[9] New South Wales Law Reform Commission, *Powers of Attorney and Unsoundness of Body or Mind* (Report No. 20, 1975) ("N.S.W. Report"); New South Wales Law Reform Commission, *Powers of Attorney* (Working Paper, 1973) ("N.S.W. Working Paper").

[10] Law Reform Commission of Tasmania, *Powers of Attorney* (Report No. 39, 1984) ("Tasmania Report"); Law Reform Commission of Tasmania, *The Law Relating to Powers of Attorney* (Working Paper No. 83/4, 1983) ("Tasmania Working Paper").

[11] New York Law Revision Commission, *Memorandum Relating to Springing Powers of Attorney*, Annual Report for 1988, 229-278 (Document No. 65, 1988) ("New York Report").

[12] California Law Revision Commission, *Tentative Recommendation Relating to Uniform Statutory Form Power of Attorney Act* (1989) ("California Report").

[13] South African Law Commission, *Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons* (1988) ("South African Report").

[14] Law Reform Commission of the Republic Of Ireland, *Land Law and Conveyancing Law: (2) Enduring Powers of Attorney* (Report No. 31, 1989) ("Irish Report").

[15] *Power of Attorney Act*, R.S.B.C. 1979, c 334 [am. 1987, c. 42, ss. 90-92; in force Oct. 14, 1987, Reg. 371/87] ("B.C. Act").

[16] *Powers of Attorney Act*, S.S. 1982-83, c. P-20.1 ("Saskatchewan Act").

[17] *Powers of Attorney Act*, S.M. 1980, c. 4 [now R.S.M. 1987, c. P97] ("Manitoba Act").

[18] *Powers of Attorney Act*, R.S.O. 1980, c. 386 [am. 1983, c. 74; 1986, c. 49; 1986, c. 64, s. 54] ("Ontario Act").

[19] *Property Act*, R.S.N.B. 1973, c. P-19, ss. 58.1-58.7 [en. 1987, c. 44, s. 1; in force Feb. 15, 1988, Gaz. Jan. 27, 1988] ("New Brunswick Act").

Zealand,[24] New South Wales,[25] Northern Territory of Australia,[26] South Australia,[27] Tasmania,[28] Victoria,[29] and the United States.[30]

(2) Consultations Outside Alberta

In some Canadian provinces the relevant legislation has been in place for several years. We are therefore in a position to benefit from that experience by taking account

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[19](...continued)

[20] *Powers of Attorney Act*, S.N.S. 1988, c. 17 ("Nova Scotia Act").

[21] *Powers of Attorney Act*, S.P.E.I. 1988, c. 51 ("P.E.I. Act").

[22] *Enduring Powers of Attorney Act* 1985, c. 29 ("English Act").

[23] *Enduring Powers of Attorney (Northern Ireland) Order* 1987, SI 1987/1627 (NI 16) [in force April 10, 1989, SI 1989/63] ("N. Ireland Order"). The Order is identical in almost all material respects to the English Act.

[24] *Protection of Personal and Property Rights Act* 1988, No. 4 ("New Zealand Act").

[25] *Conveyancing Act* 1919, as amended by the *Conveyancing (Powers of Attorney) Amendment Act* 1983, No. 26 ("N.S.W. Act"); *Protected Estates Act* 1983, No. 179, s. 76.

[26] *Powers of Attorney Act* 1980, No. 25 [in force Jan. 28, 1983, Gaz. Jan. 28, 1983], [am. 1988, No. 42] ("N. Territory Act").

[27] *Powers of Attorney and Agency Act* 1984, No. 25 [am. 1988, No. 80] ("South Australia Act").

[28] *Powers of Attorney Act* 1934, as amended by the *Powers of Attorney Amendment Act* 1987, No. 87 ("Tasmania Act").

[29] *Instruments Act* 1958, as amended by the *Instruments (Enduring Powers of Attorney) Act* 1981, No. 9691 ("Victoria Act").

[30] Every State in the U.S.A. has enduring power of attorney legislation. In most States, the legislation is based on either the *Uniform Probate Code* or the *Uniform Durable Power of Attorney Act* ("Uniform D.P.A. Act") which was approved in 1979 by the National Conference of Commissioners on Uniform State Laws. The relevant provisions of the *Uniform Probate Code*, ss. 5-501 to 5-505, were amended in 1979 to make them identical to those of the Uniform D.P.A. Act - see J.J. Lombard, "Planning for Disability: Durable Powers, Standby Trusts and Preserving Eligibility for Governmental Benefits", in *Twentieth Annual Philip E. Heckerling Institute on Estate Planning* (1986) chpt. 17. The specific details of the legislation in each State is analyzed in American College of Probate Counsel, *Durable Powers of Attorney* (Santa Monica, 1986). See also *infra* at 32-3. In 1988 the National Conference of Commissioners on Uniform State Laws approved a statutory form for powers of attorney - see *Uniform Statutory Form Power of Attorney Act* ("Uniform Act 1988"). The main feature of this Act relates to the authority of the attorney, and is discussed *infra* at 75.

of any difficulties and problems which the legislation has produced. With this goal in mind, we consulted with a number of individuals and organizations outside Alberta. A complete list of those who helped us in this way is produced in the Appendix to this Report. We are grateful to have received their assistance.

Particular attention was focused on Ontario and British Columbia, where the legislation has been in force for almost ten years. In Ontario, meetings were held with Mr. Hugh Paisley (the Public Trustee for Ontario) and members of his staff; Mr. Stephen Fram (chairman of the Ontario Advisory Committee on Substitute Decision Making for Mentally Incapable Persons); Mr. Bernard Starkman (chairman of the Ontario Guardianship and Advocacy Committee); and staff members of the Advocacy Centre for the Elderly (Toronto). In British Columbia, we consulted with the Deputy Public Trustee (Ms. June Laker), who was also a member of the sub-committee of the Succession, Trusts and Fiduciary Relationships subsection of the Canadian Bar Association (B.C. Branch) which undertook a study of the legislation in that province.

Enquiries were also made of the law reform commissions and Public Trustee's offices across Canada. These enquiries, in addition to a comprehensive literature search, ensured that we were aware of any research projects and studies on enduring powers of attorney in other jurisdictions.

(3) Consultations Within Alberta

Consultations were held with many interested groups and individuals in Alberta. A complete list of those who made submissions is produced in the Appendix to this Report. We have benefited from their comments in preparing our recommendations, and we are grateful to have received this assistance.

D. Terminology

Various terminology has been used to describe a power of attorney which continues after the mental incapacity of the donor, including "enduring", "continuing", "durable", "special", "protected" and "extended". "Enduring" is the most common, and that term will be used in this Report. For the sake of convenience, the abbreviation "EPA" will be used to refer to an enduring power of attorney.

CHAPTER 2 - THE PRESENT LAW

A. Termination by Subsequent Incapacity

(1) The General Rule

At common law, a power of attorney is terminated by the subsequent mental incapacity of the donor. The only exception to this is an irrevocable power of attorney, that is, one which is expressed to be irrevocable and is given to secure a proprietary or other interest of the attorney.[31]

The authority most frequently cited in support of the common law rule is *Drew* v. *Nunn*,[32] a decision of the English Court of Appeal. The defendant in *Drew* gave his wife authority to deal with the plaintiff, and held her out as his agent with authority to pledge his credit. The defendant later became insane, and was admitted to an asylum. During this period his wife ordered goods from the plaintiff, who was unaware of the defendant's insanity. The plaintiff subsequently sued the defendant for the price of the goods. A majority of the Court of Appeal held that the authority of an agent is terminated by the principal's incapacity.[33] However, the court also held that this termination does not prejudice third parties who deal with the agent without notice of the principal's incapacity. On that basis the court upheld the plaintiff's claim.

There are relatively few Canadian cases directly on point. However, two cases - one a New Brunswick appellate decision[34] and the other an Ontario High Court decision[35] - have held unequivocally that a power of attorney is terminated by the donor's subsequent incapacity. Support for this view is also implicit in the Supreme

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[31] See *Wilkinson* v. *Young* (1972) 25 D.L.R. (3d) 275 (Ont. H.C.); *Bowstead on Agency* (15th ed., 1985) at article 125; English Report at 7, n. 37. See also *infra* at 105.

[32] (1879) 4 Q.B.D. 661 (C.A.).

[33] The third judge, Cotton, L.J., did not express a firm view on whether incapacity necessarily terminates the agent's authority. The N.S.W. Working Paper points out that the court's decision on this issue is inconsistent with several older English cases. However, as the B.C. Report comments (at 8), "the rule that intervening mental incapacity of a principal terminates the authority of his attorney appears to be firmly entrenched even though its common law roots seem dubious".

[34] *Re Parks; Canada Permanent Trust Co.* v. *Parks* (1956) 8 D.L.R. (2d) 155 (N.B.C.A.).

[35] *Wilkinson* v. *Young*, *supra*, note 31.

Court of Canada decision in *Phillips* v. *Samilo*.[36] The Supreme Court in that case did not expressly decide that incapacity revokes the attorney's authority. However, in deciding that third parties who deal with the attorney are not prejudiced if they have no knowledge of the donor's incapacity, the court appears to have been of the view that incapacity terminates the attorney's authority, subject to the rights of innocent third parties.

There are dicta in the Ontario case of *Kerr* v. *Town of Petrolia*[37] which appear to suggest that incapacity does not necessarily terminate a power of attorney. The court expressed the view that the case-law does not support the "unqualified proposition" that incapacity of the principal *ipso facto* terminates the agency.[38] However, it is probable that the court was merely endorsing the second proposition enunciated in *Drew* v. *Nunn*, namely, that the principal remains liable to third parties who are unaware of the principal's incapacity when dealing with the agent. This appears to have been the way in which *Kerr* was interpreted by the Supreme Court in *Phillips* v. *Samilo*. Even if Kerr does stand for the proposition that incapacity does not automatically terminate the agent's authority, we share the view expressed by other law reform agencies that this cannot be accepted as correct in light of other authorities.[39]

(2) The Meaning of "Incapacity"

It is unclear from the authorities what degree of mental incapacity is sufficient to terminate a power of attorney. The judgments in *Drew* v. *Nunn* reflect this uncertainty. Bramwell, L.J. was of the opinion that "partial mental derangement" would not revoke the authority, but insanity amounting to dementia would,[40] whereas Brett L.J. appears to have applied a test of contractual capacity.

The more recent authorities equate "incapacity" with an inability to manage one's affairs.[41] In other words, if the donor's incapacity is such as would warrant a finding of incompetence under the mental incompetency legislation, this will terminate the attorney's authority. The difficulty with applying this principle in Alberta is that the relevant legislation - the *Dependent Adults Act*[42] - does not use the traditional criterion of "mental incompetence" as the basis for granting a trusteeship order. Rather, the test is whether, *inter alia*, the person is unable to make reasonable judgments in respect of matters relating to all or any part of his or her estate.[43]

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[36] [1972] S.C.R. 201.

[37] (1921) 64 D.L.R. 689 (Ont. S.C.).

[38] *Id.* at 695.

[39] See Ontario Report at 13; Manitoba Report at 5; B.C. Report at 8, n. 16.

[40] *Supra*, note 32 at 669.

[41] *Re K.* [1988] 2 W.L.R. 781 (Ct. of Protection); Halsbury's Laws of England (4th ed.), vol. 1, para. 882. See also *Re Parks*, *supra*, note 34; *Gibbons* v. *Wright* (1954) 91 C.L.R. 423 (Aust. H.C.).

The EPA legislation in other Canadian provinces offers no assistance in determining the meaning of "incapacity" in the present context. Either the term is not defined or, as in the case of the legislation in Ontario[44] and P.E.I.,[45] it is defined as "mental infirmity of such a nature as would, but for this Act, invalidate or terminate a power of attorney".[46]

In our view it is unnecessary, for the purposes of EPA legislation, to attempt to define the exact nature or degree of mental incapacity which at common law will terminate the attorney's authority. The underlying purpose of EPA legislation is to abolish the common law rule. We believe that, if the legislation provides that an EPA is not terminated by any mental incapacity or infirmity of the donor, this will be sufficiently clear to achieve that purpose.

B. Third Parties

It is well established that, where the attorney's authority is terminated by the donor's mental incapacity, the donor remains liable to third parties who have no knowledge of the incapacity when dealing with the attorney.[47] "Knowledge" in this context includes constructive knowledge, that is, knowledge of such circumstances as would put a reasonable person on inquiry.[48]

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[42] R.S.A. 1980, c. D-32, as amended.

[43] *Id.* at s. 25(1).

[44] Ontario Act, s. 1(b).

[45] P.E.I. Act, s. 1(c). See also the New Brunswick Act, s. 58.1 for a similar provision.

[46] The legislation in British Columbia, Saskatchewan and Manitoba, although not defining the term "incapacity", provides that an EPA is not terminated by reason only of "subsequent mental infirmity that would but for this Act terminate the authority". The Nova Scotia Act (s. 5) and the U.L.C.C. Act (s. 2) contain a similar provision.

[47] *Drew* v. *Nunn, supra,* note 32; *Re Parks, supra,* note 34; *Phillips* v. *Samilo, supra,* note 36.

This rule has been incorporated into legislation in most provinces.[49] Whether Alberta should do likewise is discussed in Chapter 8.

C. Liability of the Attorney

The decision of the English Court of Appeal in *Yonge* v. *Toynbee*[50] is authority for the proposition that agents who act after their authority has been terminated by reason of the principal's mental incapacity are personally liable to third parties for breach of the implied warranty of authority, even if the agent is unaware of the principal's incapacity.

In *Yonge* the defendant instructed his solicitors to defend an action which was about to be brought against him by the plaintiff. Subsequently, and before the action was commenced, the defendant was certified as being of unsound mind. Unaware of this, the solicitors entered an appearance and conducted proceedings on behalf of the defendant. When the plaintiff learned of the defendant's incapacity, he moved to have the appearance and all subsequent proceedings struck out. The court found in the plaintiff's favour, and held the defendant's solicitors personally liable in costs for having impliedly warranted an authority they did not possess.

The rule in *Yonge* v. *Toynbee* is of questionable validity. We have already noted that the rights of third parties who deal with an agent are not affected by the principal's incapacity, so long as the third party is unaware of the incapacity.[51] It is therefore difficult to understand why the attorney should be personally liable to the third party. Conversely, if the third party *is* aware of the incapacity, "the agent could not be taken to warrant the truth of something the third party knew to be false".[52]

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[48] *Re Parks*, *supra*, note 34; *Phillips* v. *Samilo*, *supra*, note 36. In *Phillips* the Supreme Court of Canada took a rather lenient view of what constitutes constructive knowledge. The court held that the circumstances of the case were sufficient to put the attorney "on guard...but there was nothing to cause further alarm" (*id*. at 209). The court held that under the circumstances the attorney should not be fixed with the knowledge of the donor's incapacity.

[49] See *infra*, note 383.

[50] [1910] 1 K.B. 215 (C.A.).

[51] *Supra*, at 14.

[52] English Working Paper at 14.

In the context of powers of attorney, *Yonge* v. *Toynbee* has been overruled by legislation in most provinces.[53] Whether Alberta should do likewise is discussed in Chapter 8.

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[53] See *infra*, note 378.

CHAPTER 3 - THE NEED FOR REFORM

A. Nature of the Problem

(1) Planning for Incapacity

The loss of capacity to manage one's own affairs is becoming a fact of life for a growing number of Albertans. There are now approximately 11,600 people in Alberta whose estates are subject to trusteeship under the *Dependent Adults Act*.[54] There are undoubtedly many others who, although not subject to trusteeship, are mentally incapable of managing their affairs.

Chronic and degenerative illnesses which affect mental capacity are becoming increasingly common. It is estimated that 10% of Canadians over the age of sixty-five, and 20% of those over the age of eighty, suffer from dementia of some kind, most commonly Alzheimer's disease.[55] As a recent study on guardianship, trusteeship and the elderly notes:[56]

> Population projections indicate that by 2001, 4 million [Canadians] will be 65 or over and by 2031 there will be 6 million elderly people in Canada (21% of the population). The numbers and proportion of those over 85 - the "older elderly" - are increasing at the fastest rate owing to advances in health care which improve their physical (although not necessarily their mental) health.

In many cases (such as Alzheimer's disease) the onset of incapacity may be a gradual process. The individual, while still competent, realizes that incapacity is likely or even imminent. In our view (which is confirmed by submissions which we have received),[57] many people faced with this situation would welcome the opportunity to plan for the future management of their affairs.

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[54] We are grateful to Alberta's Public Guardian, Ms. Melane Hotz, for supplying this statistical information.

[55] We are grateful to the Alzheimer's Society of Calgary for supplying this statistical information.

[56] R.M. Gordon, S.N. Verdun-Jones, and D.J. MacDougall, *Standing in their Shoes : Guardianship, Trusteeship and the Elderly Canadian* (Simon Fraser University, Criminology Research Centre, Burnaby, B.C., 1986) at 4.

[57] See *infra* at 24. The experience in other jurisdictions indicates that EPAs are very popular and widely used - see English Report at 13-14; B.C. Working Paper at 4.

At present, the law offers very little scope for planning for one's own incapacity. As we have seen, it is futile to use a power of attorney, because of the common law rule which terminates the attorney's authority when the donor loses capacity. An *inter vivos* trust can be established which will survive the settlor's incapacity, but this results in an immediate loss of control by the settlor and it can also have significant tax disadvantages.[58] Other mechanisms, such as appointing a nominee to receive government pension and assistance payments, are of limited scope.[59]

In the absence of EPA legislation, and any other viable mechanism for planning for incapacity, there are really only two alternatives available once a person loses capacity to manage his or her own affairs. One option is for family members (or an attorney, if a power of attorney has been granted) to manage the estate notwithstanding they lack lawful authority to do so. Law reform agencies in other jurisdictions[60] have noted that in practice many attorneys continue to act after their authority has been terminated by the donor's incapacity, and that in so doing they expose themselves to potential personal liability.[61] We share the view expressed by the English Law Commission, that "it is undesirable for common practice to be at variance with the requirements of the law".[62]

The second alternative is to bring an application under the *Dependent Adults Act*[63] for the appointment of a trustee.

(2) Dependent Adults Act

In many respects the *Dependent Adults Act* can be viewed as a model for reform in the areas of guardianship and trusteeship,[64] and indeed it has had a significant

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[58] See D.C. Simmonds, "Planning for Incapacity" (1988) 27 *E.T.R.* 117 at 121-22.

[59] *Id.* at 123-24; see also G.B. Robertson, *Mental Disability and the Law in Canada* (1987) at 170-71.

[60] B.C. Report at 10; Manitoba Report at 7; Ontario Report at 24; Newfoundland Report at 5; South Australia Report at 10; Tasmania Report at 13; English Working Paper at 21.

[61] See *supra*, at 15.

[62] English Working Paper at 21.

[63] R.S.A. 1980, c. D-32, as amended.

[64] J. Christie, "Guardianship: The Alberta Experience: A Model for Change" (1982) 3 *Health Law in Canada* 58; M.E. Hughes, "Personal Guardianship and the Elderly in the Canadian Common Law Provinces: An Overview of the Law and

(continued...)

influence on reform proposals in other provinces.[65] This is particularly true of its guardianship provisions. The Act abandons the traditional "all or nothing" approach to guardianship, which views mental competence and incompetence as mutually exclusive absolutes and which results in a person being perceived as requiring either total guardianship or no guardianship. In place of this traditional approach, the Act makes use of the concept of limited guardianship,[66] and requires the court to give the guardian only those powers which are necessary to assist the dependent adult in making reasonable judgments with respect to his or her person.[67]

Another significant feature of the Act is its departure from traditional terminology such as "mental incompetency", "mental disorder" and other diagnostic labels. Instead, it adopts a functional approach to assessing whether a person requires a trustee or guardian. For example, in the context of trusteeship, the court must decide whether the person is unable to make reasonable judgments in respect of matters relating to all or any part of his or her estate, whether the person is in need of a trustee, and whether the appointment of a trustee would be in the person's best interests.[68]

Despite the undoubted merits of the *Dependent Adults Act*, both in respect of guardianship and trusteeship, proceedings under this type of legislation involve a number of disadvantages. This has been emphasized by many law reform agencies in recommending the introduction of EPA legislation.[69] In our view these criticisms apply with equal force in Alberta.

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[64](...continued)
Charter Implications", in M.E. Hughes and E.D. Pask (eds.), *National Themes in Family Law* (1988) 138.

[65] The Saskatchewan *Dependent Adults Act* 1989, c. D-25.1 (as yet unproclaimed) and the draft legislation proposed by the Ontario Advisory Committee on Substitute Decision Making for Mentally Incapable Persons (Fram Committee) (1987), are based extensively on Alberta's *Dependent Adults Act*.

[66] Although the labels "plenary" and "partial" have been removed by amending legislation [1985, c. 21], the substance of the distinction still remains.

[67] S. 10(1) [re-en. 1985, c. 21, s. 11].

[68] S. 25.

[69] B.C. Report at 11; Manitoba Report at 7; Ontario Report at 23; Newfoundland Report at 20-21; N.S.W. Report at 13; South Australia Report at 10; Tasmania Report at 13; English Working Paper at 20.

The proceedings can be expensive[70] and time-consuming. Even where the application is unopposed (as is normally the case), it can occupy a significant amount of time. The person who is the subject of the application must be examined by a physician or a psychologist, who must then prepare a report; an inventory of the estate must be prepared, along with affidavits, consents and notices; and the matter has to be set down and oral argument presented.

Another disadvantage is that in most cases the person whose interests are paramount - the dependent adult - is merely a passive participant in the proceedings. Although in theory the court should take account of the dependent adult's views and wishes,[71] in practice it is often impossible to ascertain what these are. This is an inevitable consequence of waiting until the onset of incapacity before empowering someone to manage the estate.

One way of addressing this particular problem would be to amend the Act to enable individuals (while still competent) to designate in advance the person whom they wish to be appointed as trustee, and to create a rebuttable presumption that the designated trustee should be appointed by the court. This type of provision exists in the *Patients Property Act*[72] in British Columbia.[73] However, the Law Reform Commission of British Columbia has noted that the provision is not widely known to the lay public and (possibly) to a large section of the legal profession, and hence it is rarely used in practice.[74]

Probably the most significant problem with the *Dependent Adults Act* is that an application for a trusteeship order is usually an emotionally painful experience for all concerned. For many people, the stigma and distress involved in having a family member declared mentally incompetent make this avenue an unattractive (but necessary) option. Nor can the prospect of having to be declared mentally incompetent give much peace of mind to those whose mental faculties are beginning to deteriorate. We doubt whether the anxiety and distress are alleviated by the fact that the person will be declared "incapable of making reasonable judgments" rather than "mentally incompetent".

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[70] Note, however, that s. 48 of the Act [re-en. 1985, c. 21, s. 38] provides that the court has a discretion to order that all or part of the costs be paid by the Crown in right of Alberta, or (if it would not be a hardship to do so) by the person making the application, the person in respect of whom the application is made, or the estate of the dependent adult. See *Re Nemeth* [1989] Alta. D. 2664-01 (Surr. Ct.).

[71] *Re West* (1978) 87 D.L.R. (3d) 192 (N.B.C.A.); *Re West* (1978) 21 N.B.R. (2d) 225 (Q.B.); *Re Cochran* (1964) 47 W.W.R. 669 (Sask. Q.B.); Robertson, *supra*, note 59 at 40-1.

[72] R.S.B.C. 1979, c. 313, s. 9. The designation must be executed in accordance with the requirements for making a will.

[73] A similar type of provision is contained in s. 13 of the draft legislation proposed by the Fram Committee in Ontario, *supra*, note 65.

[74] B.C. Report at 11.

B. Advantages of the EPA

(1) Simplicity

EPAs provide a relatively simple and straightforward means of enabling people to plan for their own incapacity. The concept of a power of attorney seems ideally suited to the situation where a person anticipates becoming unable to manage his or her own affairs. For the law to revoke the attorney's authority at the very point when it is most needed is, in our view, illogical and unacceptable. As the Australian Law Reform Commission notes:[75]

> When a person has the foresight to make arrangements for his or her impending incapacity, it is most unsatisfactory if the law frustrates that planning. There is a need for a cheap, simple, self-help procedure, subject to appropriate safeguards, whereby a person can prepare in advance for his or her possible incapacity.

(2) Self-Determination

An EPA enables people to plan for their own incapacity, giving them the freedom to choose someone whom they feel is most likely to act in their best interests. This sense of control over one's life after incapacity promotes self-determination and autonomy, and enhances personal dignity.[76] It also helps to ease some of the anxiety which people feel in knowing that they may soon lose the ability to manage their own affairs.

The law is increasingly recognizing the importance of individual autonomy and self-determination. This can be seen in many diverse areas; for example, recent developments in the concept of informed consent to health care.[77] In our view it is of fundamental importance that individuals be given the opportunity to plan for their own incapacity.

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[75] Australian Report at 7.

[76] See Gordon et al., *supra*, note 56 at 329; Newfoundland Report at 6.

[77] See in particular *Reibl* v. *Hughes* [1980] 2 S.C.R. 880.

(3) An Alternative to Trusteeship

We have already discussed some of the disadvantages involved in proceedings for the appointment of a trustee under the *Dependent Adults Act*.[78] The proceedings are often time-consuming and expensive, the dependent adult is merely a passive participant, and the stigma and emotional distress can be considerable. EPA legislation would avoid many of these problems.

Some commentators have argued that the solution lies in improving the trusteeship and guardianship model rather than legislating for EPAs. According to this argument, EPAs are unnecessary if a proper trusteeship/guardianship model is in place. For example, one study states that:[79]

> [T]he fact remains that the durable power of attorney was originally proposed and debated at a time when few alternatives had been canvassed. Since that time, it has been widely recognized that the only viable approach to incompetence, guardianship and trusteeship is one that involves a radical reconstruction of the existing legal framework, rather than an exercise in "tinkering". The idea of the durable power of attorney was well intentioned; however, in the light of the availability of simplified and inexpensive mechanisms for securing judicially supervised guardianship and trusteeship, it may have outlived its usefulness.

Likewise, another recent study expresses the view that:[80]

> Durable powers of attorney, donated for the presumed benefit of mentally incompetent persons, would not be necessary if limited and tailor-made guardianship/ trusteeship arrangements were more easily secured.

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[78] *Supra*, at 18-20.

[79] Gordon *et al.*, *supra*, note 56 at 335-36.

[80] Working Group on Legal Issues, Committee on Guidelines for Comprehensive Services to Elderly Persons with Psychiatric Disorders (Health and Welfare Canada), "Legal Issues in the Care of Mentally Impaired Elderly Persons: Competence, Surrogate Management, and Protection of Rights", *Canada's Mental Health*, June 1987, 6 at 8.

We do not accept this view. Unlike most provinces, Alberta does have "limited and tailor-made guardianship/ trusteeship arrangements"; yet, our consultations within Alberta have indicated overwhelming support for EPA legislation. Moreover, we do not believe that improvements to the *Dependent Adults Act* would make EPAs unnecessary.[81] Many of the problems with the Act - particularly the stigma and emotional distress associated with the proceedings - cannot be removed by "improving" the Act. They are inherent in any system which relies on judicial or state intervention as a means of dealing with incapacity.

The introduction of EPA legislation would also promote the underlying philosophy of the *Dependent Adults Act*, namely, that trusteeship and guardianship should be viewed as a last resort and should not be imposed if there exists a less restrictive alternative.[82] The absence of EPA legislation is inconsistent with this principle. The concept of trusteeship as a "last resort" is meaningful only if there exists a viable alternative to trusteeship. EPA legislation represents such an alternative.

C. Position in Other Jurisdictions

With three exceptions, EPA legislation now exists in every Canadian province. The exceptions are Newfoundland, Quebec, and Alberta. The first two are unlikely to remain exceptions for very long; legislation has recently been proposed by the Newfoundland Law Reform Commission,[83] and is awaiting proclamation in Quebec.[84]

EPA legislation also exists in almost every other common law jurisdiction, including England, New Zealand, most of Australia, and every State in the U.S.A.

D. Previous Reform Proposals in Alberta

In 1980 the Attorney General's Department prepared a Ministerial Request for Legislation for a *Power of Attorney Act*. The draft legislation provided for a power of attorney to survive the donor's subsequent incapacity.[85] It also provided that an EPA would terminate upon a trusteeship order being granted (or the Public Trustee becoming trustee) under the *Dependent Adults Act*, and upon the certification of the donor as a mentally disordered person under the *Mental Health Act*. Other aspects of the draft legislation included the requirement of one witness other than the attorney and the attorney's spouse, and the right of interested parties to apply to the Court for an accounting after the donor has become incapable. The draft legislation was not brought forward for consideration by the Legislature.[86]

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[81] It is significant that recent proposals for comprehensive changes to trusteeship/guardianship legislation in other provinces, such as Ontario and Saskatchewan (see *supra*, note 65), have retained the concept of the EPA.

[82] Christie, *supra*, note 64; Robertson, *supra*, note 59 at 104.

[83] Newfoundland Report.

[84] On May 15, 1989, the Government of Quebec introduced Bill 145, which, *inter alia*, amends the law of mandate (the civil law equivalent of a power of attorney) so as to enable a mandate to continue after the mental incapacity of the donor. The Bill was assented to on June 22, 1989, but the provisions relating to mandate have not yet been proclaimed in force.

E. Submissions Received by the Institute

The Institute received many submissions and comments as a result of its consultations within Alberta. Almost all of these were in favour of EPA legislation being introduced in Alberta. Many individuals and organizations indicated strong support for EPA legislation, and expressed the view that its introduction in Alberta is long overdue.

Only three submissions were opposed to the introduction of EPA legislation in Alberta. One was from a legal practitioner, who gave no reasons for this opinion. The Canadian Mental Health Association (Alberta Division) expressed "grave reservations" about EPA legislation, and suggested that it should not be introduced until the entire matter of substitute decision-making has been thoroughly reviewed. The Alzheimer Society of Edmonton took the position that the *Dependent Adults Act* is generally satisfactory (although in need of some improvement) and that accordingly EPA legislation is unnecessary. However, this view is in sharp contrast to that of the Alzheimer Society of Calgary, which submitted that it "wholeheartedly supports" the introduction of EPA legislation in Alberta, and that such legislation is "long overdue".

A number of lawyers in Alberta submitted that there is a clear need for EPA legislation. Several of them referred to the fact that on many occasions they had been asked to prepare a power of attorney which would survive the incapacity of the donor. Many clients expressed surprise when told that this cannot be done under present law in Alberta.

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[85] See A. Pellatt, "Planning for Beyond Incapacity: The Enduring Power of Attorney as an Alternative to Guardianship", unpublished paper prepared for Legislative Planning, Alberta Social Services (October 1988).

[86] See also the recent report of the Alberta Civil Liberties Research Centre, *Do Not Go Gently: Law, Liberty and Aging in Alberta* (1988), which recommends the introduction of EPA legislation in Alberta.

As one might expect, many different (and often conflicting) opinions were received as to the specific content of EPA legislation, particularly with respect to the safeguards which ought to be included. What is clear, however, based on our consultations, is that there appears to be widespread support for the concept of the EPA and the introduction of EPA legislation in Alberta.

F. Conclusion

In our view the case in favour of EPAs is compelling. They provide a relatively simple and straightforward mechanism for planning for incapacity. They also respect the autonomy and dignity of the individual by enabling people to exercise control over who will manage their affairs after incapacity. EPAs avoid many of the problems associated with proceedings under the *Dependent Adults Act*, especially the emotional distress and stigma. They also promote the underlying philosophy of that Act, namely, that trusteeship should be viewed as a last resort and should be used only if there is no less restrictive alternative. In our view the introduction of EPA legislation in Alberta will give real meaning to that philosophy.

This is not to say that EPAs are problem-free. We recognize that they involve a potential for abuse and exploitation. We explore this in detail in the next Chapter. However, so long as the legislation contains proper safeguards, the problem of abuse and exploitation can be minimized. We agree with the view expressed by the Ontario Law Reform Commission:[87]

> There are those who argue that such a reform of our law would leave the way open to grave abuse. This argument loses what merit it may have if safeguards are built into our Act, to minimize the opportunities for improper use of a power in these circumstances.

RECOMMENDATION 1

We recommend that legislation be introduced to enable a power of attorney to be granted which will continue notwithstanding any subsequent mental incapacity or infirmity of the donor.

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[87] Ontario Report at 24.

CHAPTER 4 - SAFEGUARDS

A. The Need for Safeguards

(1) The Potential for Abuse

Despite their many advantages, EPAs present an obvious potential for abuse. They enable the attorney to exercise authority after the donor's mental incapacity and, *ipso facto*, after the donor has lost the capacity to control and monitor the attorney's conduct. The prospect of the attorney having unlimited power over the donor's estate after the donor's incapacity, and being accountable to no-one other than the donor, involves a clear risk of abuse.

In many cases that risk may be present at the moment the EPA is signed. As the English Law Commission points out:[88]

> Many people will not consider the creation of an EPA until their mental state is beginning to deteriorate. There is a likelihood that such a donor will be highly suggestible and liable to do whatever the prospective attorney says is best for him without appreciating the effect of the grant either in terms of the "enduring" element or in terms of the scope of the authority being granted.

In order to assess the nature and extent of the risk of abuse, it is helpful to examine the problems which have been encountered in jurisdictions which have had EPA legislation for some time. In this regard we looked at two provinces - Ontario and British Columbia - where the legislation has been in place for almost ten years.

(2) Experience in Other Provinces

(a) Ontario

Ontario has had EPA legislation since 1980. During our consultations with individuals and organizations in Ontario, we were told of a number of problems that have been encountered. The first is the possibility of EPAs being signed by donors who lack the capacity to understand what they are doing. This concern is articulated by the Fram Committee as follows:[89]

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[88] English Report at 15-16.

[89] *Supra,* note 65 at 191. The same concern was expressed in our consultations with the Advocacy Centre for the Elderly (Toronto) and with the Public Trustee for Ontario. See also Gordon *et al., supra,* note 56 at 331.

> A number of continuing powers of attorney have been filed with the Public Trustee, where the power has been signed immediately before the purported grantor is medically certified at a psychiatric facility, as incapable of managing property. While situations in which a person is mentally capable on one day and medically certifiable as incapable of managing property the next are known to exist, the number of powers of attorney filed in these circumstances is suspiciously high. At law, no power of attorney exists where the person creating it does not understand the nature and consequences of the document being signed. It is difficult and costly to attack the legal validity of a continuing power of attorney.

However, as the Fram Committee itself points out,[90] it cannot necessarily be inferred that EPAs signed in such circumstances are the result of improper motives on the part of the donor's family or other individuals. The EPAs may well have been signed in order to prevent the Public Trustee from becoming committee (trustee) of estate once the donor was certified as incapable of managing his or her affairs.[91]

This explanation seems likely in view of the nature of the certification provisions in Ontario. As in Alberta,[92] Ontario legislation provides that the Public Trustee automatically becomes the committee of estate of residents in psychiatric facilities who are certified by a physician as being incapable of managing their affairs.[93] However, in contrast to the position in Alberta, the Ontario legislation does not give the physician any discretion as to whether to conduct an examination and whether to issue a certificate; every resident who does not already have a committee *must* be examined, and a certificate *must* be issued for those who are assessed as incapable of managing their affairs.[94] The result is that, in Ontario more so than in most other provinces,[95] there is a greater likelihood of the Public Trustee taking over as committee of estate. This may well explain the number of EPAs executed in Ontario shortly before the donor is certified as incapable of managing property.[96]

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[90] *Supra,* note 65 at 192.

[91] S. 5a of the Ontario Act [en. 1983, c. 74, s. 1] provides that an EPA may expressly exclude the operation of s. 38 of the *Mental Health Act*, which provides for the Public Trustee to become committee of estate of persons who are certified by a physician as incapable of managing their affairs. This issue is discussed *infra* at 100-1.

[92] *Dependent Adults Act*, R.S.A. 1980, c. D-32, ss. 50-52.

[93] *Mental Health Act*, R.S.O. 1980, c. 262, s. 38 [am. 1983, c. 75, s. 1].

[94] *Id.*, s. 36. There is evidence that in practice physicians exercise a discretion which the legislation does not give them; in many cases the examination is not conducted, or the certificate is not issued, because the physician feels that certification would be inappropriate in the circumstances - see P. Bartlett, "Reform of the Ontario Office of the Public Trustee" (1986) 24 *Univ. West. Ont. L. Rev.* 79 at 86-8.

Another concern which is evident in Ontario is that many donors may not understand the full implications of signing an EPA. Donors, although *capable* of such understanding, may not receive sufficient advice or information to appreciate fully what they are doing. The Advocacy Centre for the Elderly (Toronto) informed us that it receives may enquiries from elderly persons concerning EPAs, and that many of these individuals misunderstand the consequences of signing an EPA. In particular, many do not appreciate that the power commences immediately, rather than when they become incapable of managing their affairs. Also, many do not realize that they can revoke the EPA while they are still competent.

This problem may be exacerbated by the popularity of stationers' "standard form" EPAs in Ontario. We were told that these forms are frequently used by donors, who usually execute them without legal advice.

We were also informed by the Public Trustee's Office in Ontario of a number of cases in which attorneys under an EPA have misappropriated the donor's property. The Public Trustee also expressed concern at the risk of mismanagement by attorneys who, although acting in good faith, may lack the experience and skill to manage the estate in a reasonable and proper manner. We were told that section 9 of the Ontario Act, which enables interested persons (including the Public Trustee) to apply to the court for an order directing the attorney to pass accounts, is ineffective and offers little protection against abuse and mismanagement by the attorney.[97]

(b) British Columbia

British Columbia has had EPA legislation since 1979. The legislation is similar to the *Uniform Act* adopted by the Uniform Law Conference of Canada in 1978, and contains very few formalities and safeguards.[98]

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[95](...continued)

[95] See Robertson, *supra*, note 59 at 57.

[96] Note also that a person may be incapable of managing his or her affairs but still have the necessary capacity to execute a valid power of attorney - see *Re K.*, *supra*, note 41, and the discussion *infra* at 58-9.

[97] This issue is discussed more fully *infra* at 72-3.

[98] See *infra* at 31-2.

In 1987 a sub-committee of the Succession, Trusts and Fiduciary Relationships subsection of the Canadian Bar Association (B.C. Branch) was struck to examine the EPA legislation in British Columbia. The sub-committee has not yet issued its final recommendations, but it has considered a number of proposals which would strengthen the safeguards in the legislation. A recent article discussing the sub-committee's work notes that:[99]

> Two of the greatest problems faced with respect to Enduring Powers of Attorney are the lack of knowledge and understanding of the parties involved and the inability of any government body to call for an accounting.

We were informed that, as in Ontario, the Public Trustee's Office in British Columbia has dealt with a number of cases of misappropriation and abuse by attorneys under an EPA. The Deputy Public Trustee also expressed concern with respect to donors signing an EPA without fully understanding what they are doing. She informed us that this type of case is frequently encountered in practice.

It should be noted, however, that these views contrast with those of the Law Reform Commission of British Columbia. In its recent Working Paper, published in June 1989, the Commission made a number of recommendations with respect to the commencement and termination of EPAs,[100] but it did not recommend (or even discuss) changing the safeguards surrounding their execution. It is implicit in the Working Paper that the Commission felt that a proper balance between simplicity and formality had been achieved, and that all that was required was some "fine-tuning" of the legislation.[101] The Commission expressed the view that:[102]

> The concept of the enduring power of attorney appears to have been well-received by both the public and the legal profession. It has become widely used and nothing in our experience with [the statute] calls its basic principle into question.

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[99] Canadian Bar Association Newsletter, B.C. Branch, April 1989.

[100] These are discussed *infra* Chapters 6 and 7.

[101] The title of the Working Paper is *The Enduring Power of Attorney: Fine-Tuning the Concept*.

[102] B.C. Working Paper at 4.

(c) Summary

In our view the greatest concern raised by the experience in Ontario and British Columbia is the danger of donors executing EPAs without fully understanding the implications of what they are doing. Our impression is that the problem is not so much one of mentally incompetent donors (although such cases do arise) but rather one of uninformed donors.

The granting of an EPA has extremely important consequences. It is essential that the legislation make some attempt to ensure that donors are aware of these consequences before signing an EPA. We shall return to this point later in this Chapter.[103]

B. Finding the Proper Balance

(1) Simplicity v. Formality

All the law reform agencies which have studied EPAs have emphasized the need to strike a proper balance between simplicity and formality. Safeguards are certainly necessary. But if the legislative scheme is too formal and complex, there is a real danger of defeating the underlying purpose of the legislation, namely, to provide a relatively simple and straightforward means of planning for one's own incapacity. Excessive formality may well result in EPAs being rarely used, in which case the legislation will have achieved very little.

Another consequence of excessive formality is the risk of inadvertent non-compliance. As the number of formal requirements increases, so too does the risk of the parties' expectations being frustrated by inadvertent non-compliance with a technicality.[104]

It is easy to identify the need to strike a proper balance between simplicity and formality. It is much more difficult to decide where that balance lies. Before discussing our own approach to this issue, it is instructive to examine how the problem has been resolved in other jurisdictions.

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[103] *Infra* at 45-51.

[104] See the B.C. Report at 25.

(2) Legislative Trends

(a) Canada

Canadian EPA legislation tends to favour simplicity over formality. In British Columbia, Saskatchewan and Manitoba, the EPA legislation is similar or identical to the *Uniform Powers of Attorney Act*, which was adopted by the Uniform Law Conference of Canada in 1978. The U.L.C.C. Act contains few safeguards. It merely provides that:[105]

> The authority of an attorney given by a written power of attorney that,
>
> (a) provides that the authority is to continue notwithstanding any mental infirmity of the donor; and
>
> (b) is signed by the donor and a witness, other than the attorney or the spouse of the attorney, to the signature of the donor,
>
> is not terminated by reason only of subsequent mental infirmity that would but for this Act terminate the authority.

It is interesting that these safeguards all focus on the moment of execution. There is nothing in the U.L.C.C. Act (or in the legislation in B.C., Saskatchewan and Manitoba) which relates to events after the EPA has been signed and which enables the attorney's conduct to be reviewed, such as provision for interested persons to obtain an accounting or for the court to remove the attorney.

The original report submitted to the Uniform Law Conference by the Ontario delegates in 1976 canvassed many more safeguards than were ultimately adopted.[106] The report discussed issues such as whether EPAs should be registered with the court, whether interested parties should have the right to apply for an order directing the attorney to pass accounts, and whether there should be provision for removal and substitution of the attorney by the court. The report of the conference proceedings notes that:[107]

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[105] S. 2(1).

[106] See *Proceedings of the 58th Annual Meeting of the Uniform Law Conference of Canada* (1976) at 204-15.

[107] *Proceedings of the 60th Annual Meeting of the Uniform Law Conference of Canada* (1978) at 236.

> Little agreement was reached beyond the general principle that legislation to provide for a form of power of attorney that could survive mental incapacity was desirable. There was apparently a general feeling that the legislation should be as simple as possible and should be modelled on a comparable provision of the American Uniform Probate Code.

In the other Canadian provinces (Ontario, New Brunswick, Nova Scotia and P.E.I.) the safeguards which are imposed with respect to execution of an EPA are virtually identical to those contained in the U.L.C.C. Act. However, the legislation in these provinces also makes some provision for monitoring the attorney's conduct. For example, interested persons can apply to the court for an order directing the attorney to pass accounts,[108] and the court has the power to remove the attorney and substitute another.[109]

(b) United States

Every State in the U.S.A. has EPA legislation. In most States the legislation is modelled on either the Uniform Probate Code or the Uniform D.P.A. Act which was approved in 1979 by the National Conference of Commissioners on Uniform State Laws. The relevant provisions of the Uniform Probate Code were amended in 1979 to make them identical to those of the Uniform D.P.A. Act.[110]

The Uniform D.P.A. Act contains very little in the way of safeguards; indeed, the only requirements are that the EPA be in writing and contain a statement that the power is to be exercisable notwithstanding the donor's subsequent incapacity.[111]

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[108] Ontario Act, s. 9; New Brunswick Act, s. 58.5; Nova Scotia Act, s. 7(1)(a); P.E.I. Act, s. 9. See *infra* at 72.

[109] Ontario Act, s. 10; New Brunswick Act, s. 58.6; Nova Scotia Act, s. 7(1)(c); P.E.I. Act, s. 10. See *infra* at 91.

[110] Lombard, *supra*, note 30. In 1988 the National Conference of Commissioners on Uniform State Laws approved a statutory form for powers of attorney - see the Uniform Act 1988. The main feature of this Act relates to the authority of the attorney, and is discussed *infra* at 75.

[111] The Uniform Act 1988 prescribes additional formalities if the statutory form is used. In particular, the donor's signature must be acknowledged before a notary public.

Although using the Uniform D.P.A. Act as a model, many States have included additional safeguards in their own legislation.[112] For example, EPAs in South Carolina must be executed with the same formalities as apply to a will, thus requiring three witnesses and execution before a notary public.[113] EPAs in California must be acknowledged before a notary public and be witnessed by two persons who know the donor or to whom the donor's identity has been proved by "convincing evidence".[114] In Oklahoma, EPAs must be approved by a judge of the county in which the donor resides.[115] Several States impose additional safeguards (in particular, execution before a notary public) if the attorney is authorized to deal with real property.[116] Some make provision for the court to order the attorney to pass accounts, on application by the donor, but very few States entitle an "interested party" to apply for such an order.

Because the specific details vary across the country, it is difficult to generalize as to the level of safeguards imposed by the legislation in the United States. Nevertheless, it would appear that the majority of States adopt relatively few safeguards. This is true with respect to both the execution of the EPA and also the subsequent monitoring of the attorney's conduct.

(c) Australia

As with the United States, it is difficult to summarize the general pattern of EPA legislation in Australia, because the statutory scheme differs in each State. On the whole, however, Australian EPA statutes tend to have more safeguards than their Canadian counterparts. For example, some States require all EPAs to be registered,[117] while others impose greater formality of execution than in Canada, especially with respect to attestation.[118] Also, the court's supervisory powers (particularly the power to direct the attorney to pass accounts) tend to be broader than in Canada.[119]

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[112] The specific details of the legislation in each State is analyzed in American College of Probate Counsel, *supra*, note 30.

[113] A.L. Moses & A.J. Pope, "Estate Planning, Disability, and the Durable Power of Attorney" (1979) 30 *S. Carolina L. Rev.* 511.

[114] California Civil Code, s. 2452. The California Law Revision Commission has noted that the latter requirement makes execution of the form more difficult and causes confusion - see California Report at 10. The Commission recommended that the legislation be amended to bring it into line with the Uniform Act 1988.

[115] 58 Okla. Statutes Annotated, para. 1051. The Model Act proposed by the National Conference of Commissioners on Uniform State Laws in 1964 required judicial approval of all EPAs, as well as execution in the presence of a judge.

[116] American College of Probate Counsel Report, *supra*, note 30.

[117] See *infra*, note 190.

(d) England and Northern Ireland

England has probably the most elaborate EPA scheme of all the jurisdictions which we examined.[120] The formalities of execution are similar to those in Canada, except that a prescribed form must be used, and the form contains information as to the nature and effect of an EPA.[121] However, the most significant feature of the English Act is its registration requirement, the details of which are discussed below.[122] All EPAs must be registered with the Court of Protection as soon as the attorney has reason to believe that the donor is (or is becoming) mentally incapable. The donor and the donor's near relatives must be given notice of the application for registration, and the legislation provides a number of grounds on which the application may be opposed. If the registration is approved, the court is invested with a wide range of supervisory powers over the attorney's management of the estate.

The legislation in Northern Ireland is identical in almost all material respects to the English Act.

(e) New Zealand

The New Zealand Act came into force in October 1988.[123] To a large extent its EPA provisions are modeled on the English Act.[124] The major difference, however, is that the New Zealand legislation does not adopt a registration requirement.[125] In most other respects it is identical to the English Act, particularly on issues such as the formalities of execution, the use of prescribed forms, and the court's supervisory powers.

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[118] See *infra*, at 40 and 42.

[119] See *infra*, at 73.

[120] The legislation in Northern Ireland is identical in almost all material respects to the English Act - see Enduring Powers of Attorney (Northern Ireland) Order 1987, SI 1987/1627 (NI 16).

[121] See *infra*, at 47-8.

[122] See *infra*, at 54-6.

[123] For a discussion of the New Zealand Act see W.R. Atkin, "Enduring Powers of Attorney in New Zealand" [1988] *New Zealand Law Journal* 368 (October).

[124] Only part of the New Zealand Act deals with EPAs; the bulk of the Act is concerned with guardianship and trusteeship.

(3) The Institute's Approach

It is apparent from our examination of the position in other jurisdictions that EPA legislation, particularly in Canada, tends to favour simplicity over formality. We agree with that philosophy. Accordingly, in determining what safeguards ought to be incorporated into the proposed legislation, we have been guided by a presumption in favour of simplicity. Safeguards which detract from the simplicity of the scheme should be imposed only where two conditions are satisfied. First, the purpose underlying the safeguard must be sufficiently important to justify the encroachment on simplicity. Second, there must be a likelihood that the safeguard will achieve its purpose.

With this approach in mind, it is important to identify the functions which EPA safeguards may serve. The first is to provide sufficient evidence that an EPA has been granted. In our view this can be achieved with a minimum of formalities.

A second function is to protect the donor against fraud and undue influence when the EPA is signed. As we discussed earlier in this Chapter,[126] EPAs are often signed by donors whose mental faculties are beginning to deteriorate. This presents a potential risk of exploitation and undue influence. However, one must be careful not to overestimate the extent of that risk, or, indeed, the extent to which legislation can effectively guard against it. The view of the English Law Commission is instructive on this point:[127]

> EPAs would be unlikely to increase substantially the risk of donors being exploited. Clearly the determined criminal would always be able to find easier methods of exploitation than the securing of his appointment as an EPA attorney. He might, for example, be able to persuade the would-be donor to sign away his property or make gifts in his favour or to members of his family. He might forge the would-be donor's signature to cheques and pass books. But even the

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[125] Another significant difference, which falls outside the scope of the present Report, is that the New Zealand Act extends the power of attorney model beyond its traditional financial context and makes provision for "powers of attorney for personal care and welfare". As is noted in Chapter 1 of this Report, this concept will form part of the second phase of the Institute's project.

[126] *Supra*, at 26-9.

[127] English Report at 12.

> less unscrupulous person would find that the EPA offered little scope for exploitation than did not exist at present with an ordinary power.[128]

A third function of safeguards concerns donors who do not fully appreciate what they are doing when signing an EPA. We have already referred to the evidence from other provinces which indicates that this is a serious problem in practice.[129] In our view it is essential that the legislation attempt to address this problem.

Finally, there is the risk of mismanagement (either negligent or fraudulent) by the attorney. We recognize that this is a risk which the donor may well have considered, and presumably decided to accept, when appointing the attorney.[130] Nevertheless, in our view the legislation should provide some mechanism for reviewing the attorney's conduct after the donor has become mentally incompetent.

Having outlined our general approach to the issue of safeguards, we now proceed to discuss the particular safeguards which should be incorporated into the legislation.

C. Formalities of Execution

(1) Execution

(a) By the donor

The term "power of attorney" refers to the written instrument which creates the relationship of agency between donor and attorney. However, the appointment of an agent (even one with general powers) need not be in writing, except where the agent is authorized to execute a deed on behalf of the principal.[131] Thus, in theory it is possible for one person to appoint another as a general agent, to manage his or her entire affairs, without using a written instrument. In practice, however, such an appointment is invariably in writing, for obvious reasons. Not only is written evidence important from the standpoint of the donor and the attorney, it is essential, practically speaking, if third parties are to rely on the attorney's authority.

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[128] We find it somewhat ironic that, having expressed this view, the English Law Commission went on to recommend an elaborate registration scheme (which was implemented in the legislation), one of the purposes of which is to protect the donor from undue influence and exploitation.

[129] *Supra*, at 28-9.

[130] See B.C. Report at 20.

[131] *Nation Trust Co.* v. *Nadon* (1915) 7 W.W.R. 1067 (Sask. C.A.); G.H. Fridman, *The Law of Agency* (5th ed., 1983) at 48; Bowstead, *supra*, note 31 at article 9. There are some statutory exceptions to this rule; see e.g. *Bills of Sale Act*, R.S.A. 1980, c. B-5, s. 30; *Trust Companies Act*, R.S.A. 1980, c. T-9, s. 166.

The EPA legislation in every jurisdiction which we examined requires an EPA to be in writing and signed by the donor.[132] We consider the justification for this requirement to be self-evident, and (subject to one modification) we recommend that it be adopted.

RECOMMENDATION 2

We recommend that the proposed legislation require that an enduring power of attorney be in writing and (subject to recommendation No. 3) be signed by the donor.

(b) On behalf of the donor

A requirement that EPAs be signed *by the donor* discriminates against those who are physically incapable of signing the instrument. Although such cases might be rare in practice - the donor would have to be mentally capable of understanding the nature and effect of the EPA, but be physically incapable of signing it - we believe that it would be wrong to deprive such individuals of the opportunity of utilizing an EPA.

Legislation in some jurisdictions expressly permits an EPA to be signed by someone other than the donor, in the presence and under the direction of the donor.[133] This parallels the provision contained in the *Wills Act*.[134] However, the legislation in these jurisdictions places no restrictions on when an EPA can be signed by proxy; in particular, it is not limited to situations of physical incapacity. In our view such a limitation should be imposed. To enable an EPA to be signed by someone other than the donor (albeit in the presence and under the direction of the donor) increases the risk of abuse. It should be permitted only in exceptional circumstances. In our view the only situation in which it is justified is where the donor is physically incapable of signing the instrument. We also consider it prudent to require that the proxy be someone other than the attorney, a witness to the EPA, or the spouse (including "common law" spouse)[135] of the attorney or witness.

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[132] One exception to this relates to an EPA signed on behalf of the donor. This is discussed *infra*, at 37-8.

[133] See e.g. New Brunswick Act, s. 58.2(1)(b) [en. 1987, c. 44, s. 1]; N. Territory Act, s. 6(4). The draft legislation proposed by the South African Law Commission (South African Report at 52) also makes provision for proxy signing. But see Tasmania Act, s. 11H, which provides that an EPA cannot be signed by a proxy.

[134] *Wills Act*, R.S.A. 1980, c. W-11, s. 5.

RECOMMENDATION 3

We recommend that the proposed legislation provide that an enduring power of attorney may be signed on the donor's behalf, in the presence and under the direction of the donor, by a person other than the attorney, a witness, or the spouse of the attorney or witness, if the donor is physically incapable of signing it.

(c) By the attorney

The creation of an EPA is a serious matter for the attorney as well as the donor. The attorney is placed in a position of trust and responsibility, which may prove to be onerous and time-consuming. The implications of the appointment for the attorney are particularly significant in view of the recommendations which we make later in this Report,[136] namely, that after the donor becomes mentally incapable the attorney should have a duty to manage the donor's affairs and should not be able to resign without leave of the court.

Because of the important implications which an EPA has for the attorney, some jurisdictions require the attorney to acknowledge the appointment.[137] The attorney must either sign the EPA[138] or execute a prescribed form of acceptance which is attached to it.[139] Canadian EPA legislation does not adopt this requirement, although it was recommended by the law reform commissions of Manitoba[140] and British Columbia.[141]

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[135] The draft legislation in Part IV of this Report defines "spouse" as including parties to a relationship between a man and a woman who are living together on a *bona fide* domestic basis. This is in line with the definition of "cohabitation" proposed in the Institute's recent report, *Towards Reform of the Law Relating to Cohabitation Outside Marriage* (Report #53, 1989) at 50.

[136] *Infra*, at 67-71 and 96-7.

[137] At common law there is no requirement that the attorney sign the instrument or otherwise acknowledge the appointment - see Bowstead, *supra*, note 31 at article 8.

[138] New Zealand Act, s. 95(1)(c); English Act, s. 2(1)(b); N. Ireland Order, s. 4(1)(b). In England and Northern Ireland, attorneys are required to sign a statement that they understand that they have a duty to apply to the court to have the EPA registered when the donor is becoming or has become mentally incapable, and also that they understand their limited powers to use the donor's property to benefit persons other than the donor - see the Enduring Power of Attorney (Prescribed Form) Regulations 1987, SI 1987/1612; Enduring Power of Attorney Regulations (Northern Ireland) 1989, SI 1989/64.

In those jurisdictions which require the attorney to execute a written acceptance, the prescribed form contains a statement that the attorney understands the obligations which are imposed by the legislation. The Australian Law Reform Commission felt that this was inadequate, and recommended that the written acceptance set out in plain language the duties of the attorney, including the duty to keep accounts, the duty to keep the donor's property separate from the attorney's, and the duty to avoid conflicts of interest.[142]

There is some merit in having the attorney sign the EPA or acknowledge the appointment in some other way. However, we do not consider its underlying objective to be sufficiently important to justify making this a statutory requirement. On this particular issue we are especially concerned about the risk of inadvertent non-compliance. We do not think that it would be appropriate to invalidate an EPA simply because the attorney omitted to sign or acknowledge it. Additional problems might arise if more than one attorney were appointed. If one omitted to sign or acknowledge the appointment, what effect would this have? This example highlights the complexities which could arise from a requirement that the EPA be signed or otherwise acknowledged by the attorney. Our recommendation is that this requirement should not be adopted.

RECOMMENDATION 4

We recommend that the proposed legislation should not require an enduring power of attorney to be signed or acknowledged by the attorney.

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[139] N. Territory Act, s. 13; South Australia Act, s. 6(2); Tasmania Act, s. 11A(2).

[140] Manitoba Report at 11.

[141] B.C. Report at 25. The specific recommendation was that the attorney should acknowledge the appointment in the presence of a person authorized to swear affidavits, and the latter would certify that the attorney appeared to be mentally competent and appeared to understand the document. However, failure to comply with this requirement would not invalidate the EPA.

[142] Australian Report at 13 and 37-8.

(2) Witnesses

(a) Requirement of witnesses

Every Canadian province which has EPA legislation requires that the execution of an EPA be witnessed. This is also true in England, Northern Ireland, Australia, New Zealand, and most of the United States.

The reasons usually given for this requirement are that it (1) confirms the identity of the donor and the absence of physical duress, (2) minimizes the risk of forgery, (3) impresses upon the donor the seriousness of the proposed action, and (4) provides evidence of authenticity to third parties relying on the power of attorney. In our view these reasons justify imposing a requirement that EPAs be witnessed.

(b) Number of witnesses

Most jurisdictions - including all Canadian provinces which have EPA legislation - require that there be one witness to the execution of an EPA.[143] In Tasmania and Victoria,[144] and some States in the U.S.A.,[145] two witnesses are required.

A requirement of two witnesses was proposed by the Manitoba Law Reform Commission,[146] but this was not implemented in the legislation.[147] The recent reports of the South African Law Commission,[148] the Australian Law Reform Commission,[149] and the Fram Committee in Ontario,[150] also favour two witnesses. The Fram Committee recommended that:[151]

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[143] In Alberta, a power of attorney need only be witnessed by one person in order to be registered at the Land Titles Office - *Land Titles Act*, R.S.A. 1980, c. L-5, s. 151.

[144] Tasmania Act, s. 11A(2); Victoria Act, s. 115.

[145] See American College of Probate Counsel, *supra*, note 30. In South Carolina, three witnesses are required - see Moses & Pope, *supra*, note 113.

[146] Manitoba Report at 11.

[147] The Manitoba Report also recommended that one of the witnesses be a physician, surgeon, barrister or solicitor, and that the witnesses be required to swear an affidavit of execution, stating that they know the donor personally, that they have reason to believe that the donor and the person who executed the power of attorney are one and the same person, and that the donor appeared to be of sound mind and appeared to understand what was being executed. This was not implemented in the legislation.

[148] South African Report at 52.

[149] Australian Report at 12.

> To better ensure that grantors of the power understand what they are doing, two witnesses should be present when the power of attorney is signed. The witnesses should then certify, in writing, that, in their opinion, the grantor appreciated the nature and consequences of the power.

In our opinion the case for two witnesses rather than one is not strong. We agree with the Newfoundland Law Reform Commission that "two witnesses are unlikely to deter fraud more than one witness would."[152] We do not accept the Fram Committee's view that the presence of two witnesses will better ensure that donors understand what they are doing. It is certainly important that steps be taken to ensure that donors appreciate the implications of signing an EPA. However, we seriously doubt whether a requirement of two witnesses would achieve this. We believe that the solution lies in ensuring that donors are given the necessary information to assist them in understanding the consequences of what they are doing, an issue which we shall return to later in this Chapter.[153]

We conclude that there is insufficient justification for the proposed legislation to require two witnesses rather than one.

(c) Ineligible witnesses

Almost every jurisdiction excludes certain people from acting as a witness to the execution of an EPA. The most common approach is to exclude the attorney and the attorney's spouse. Canadian EPA legislation adopts this approach, with the exception of New Brunswick which excludes only the attorney.[154] Ontario has recently amended its legislation to exclude the attorney's "common law" spouse.[155]

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[150] *Supra*, note 65.

[151] *Id.* at 97.

[152] Newfoundland Report at 34.

[153] *Infra*, at 45-51.

[154] The Regulations in England and Northern Ireland (*supra*, note 138) and the legislation in New Zealand, New South Wales and Victoria also exclude only the attorney.

[155] S.O. 1986, c. 64, s. 54. This is also recommended in the Newfoundland Report.

In a few jurisdictions the class of ineligible witnesses is much broader in scope. For example, in the Northern Territory of Australia the exclusion extends to near relatives of the attorney, while in Tasmania all relatives of the attorney and of the donor are ineligible to act as witnesses.[156]

The recent report of the Fram Committee in Ontario recommended expanding the class of ineligible witnesses to include persons who are related to the donor or the attorney by blood, adoption or marriage or whom the donor or attorney has demonstrated a settled intention to treat as his or her child. The staff of a facility at which the donor is receiving board or other personal care, persons who have a committee of estate or guardian, and anyone engaged in litigation against the donor, would also be excluded. The Committee noted that:[157]

> The Committee understands that these safeguards will cause inconvenience to grantors creating the powers. Relatives who may seem appropriate are excluded. It will be difficult to find witnesses. Nevertheless, continuing powers of attorney confer great authority on the attorney and are intended to operate when the grantor is not mentally capable of supervising the exercise of the authority.

In our view the attorney and the attorney's spouse (including "common law" spouse)[158] should be ineligible as witnesses. The attorney, although strictly speaking not a party to the document, is so closely connected with it as to make it inappropriate for the attorney to act as witness.[159] This also applies to the attorney's spouse. We view this as analogous to the statutory rule which prevents a beneficiary and spouse from acting as a testamentary witness.[160]

We do not favour expanding the class of ineligible witnesses beyond the attorney and the attorney's spouse. A blanket exclusion of all relatives (or near relatives) of the donor and attorney is unduly restrictive and its underlying premise (namely, that anyone who is related to the donor or to the attorney is automatically an inappropriate witness) appears to us to be unsound.[161] Moreover, a broadly based exclusion is unnecessary in view of our later recommendations that EPAs should be witnessed by a lawyer.[162] So long as the lawyer is not the attorney or the attorney's spouse, we believe that this adequately protects the donor's interests.

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[156] N. Territory Act, s. 14; Tasmania Act, s. 11A(2)(a). The same is true of the draft legislation proposed by the Australian Law Reform Commission (see Australian Report at 12 and 30).

[157] *Supra*, note 65 at 97.

[158] See *supra*, note 135.

[159] This was the reasoning used in *Hebb* v. *Registrar of Titles* [1983] 3 W.W.R. 48 (N.W.T.S.C.), in which it was held that a power of attorney cannot be registered under the *Land Titles Act* if the attorney is the sole witness to the execution of the instrument.

[160] *Wills Act*, R.S.A. 1980, c. W-11, s. 13(1).

(d) Lawyers or Doctors as Witnesses

Some law reform agencies have considered whether EPAs should be witnessed by a lawyer or medical practitioner, who would be required to certify that the donor was of sound mind and understood the nature and effect of signing the EPA. With the exception of the Manitoba Law Reform Commission,[163] law reform agencies have unanimously rejected this requirement, principally on the ground that it would introduce unnecessary complexity.[164] None of the EPA statutes which we examined contains such a requirement.

In view of other recommendations which we make in this Report, we do not believe that a requirement that EPAs be witnessed by a lawyer would create additional complexity or expense. In particular, we recommend later in this Report that EPAs be accompanied by a certificate of legal advice, signed by a lawyer who is not the attorney or the attorney's spouse.[165] The primary aim of this proposal is to ensure that the donor understands the legal implications of granting an EPA. Since this proposal will require the donor to attend before a lawyer, we believe that it would simplify matters to have the lawyer act as a witness. Accordingly, we recommend that EPAs be witnessed by a lawyer as set out in Recommendation No. 7.

RECOMMENDATION 5

We recommend that the proposed legislation require the execution of an enduring power of attorney to be witnessed by a lawyer as set out in Recommendation No. 7.

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[161] In its Working Paper, the Newfoundland Law Reform Commission tentatively suggested that the donor's children and their spouses be excluded as witnesses. This was unfavourably received and the final report recommended against such an extension.

[162] *Infra*, Recommendations Nos. 5 and 7.

[163] See *supra*, note 147.

[164] See Ontario Report at 25; Newfoundland Report at 31-33; English Report at 26-27; Tasmania Report at 14.

[165] *Infra*, Recommendation No. 7.

(3) Expressed Intention

Almost every jurisdiction which we examined requires that an EPA contain an express statement indicating that it is to continue notwithstanding the mental incapacity or infirmity of the donor. The alternative approach - which is adopted in some parts of the United States[166] - regards every power of attorney as an EPA unless the donor indicates a contrary intention.

To invest an attorney with authority which will continue after the donor becomes mentally incapable is an extremely important matter, and we believe that donors should be required to state that this is indeed their intention. We also consider it important that the enduring nature of an EPA should be apparent from the face of the instrument. This makes it clear to all concerned, particularly third parties who deal with the attorney, that the authority is not terminated by the donor's incapacity. The requirement of an express statement is not an onerous one, nor does it detract from the simplicity of the scheme in any significant way. We therefore recommend that it be adopted.

Later in this Report we recommend that the proposed legislation should make provision for "springing" powers of attorney.[167] This will enable donors to grant a power of attorney which will take effect in the event of their mental incapacity or infirmity. We believe that it is unnecessary for this type of instrument to provide that it will continue notwithstanding the incapacity or infirmity of the donor. Instead, the instrument should contain a statement indicating that it is to take effect upon the mental incapacity or infirmity of the donor.

RECOMMENDATION 6

We recommend that the proposed legislation require that an enduring power of attorney contain a statement indicating either that it is to continue notwithstanding the donor's subsequent mental incapacity or infirmity, or that it is to take effect upon the mental incapacity or infirmity of the donor.

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[166] The Uniform D.P.A. Act provides that an EPA must contain express words showing that the authority conferred shall be exercisable notwithstanding the donor's subsequent incapacity. This provision has been adopted in all states except Georgia, Illinois, Louisiana and Oregon - see American College of Probate Counsel, *supra*, note 30. The New South Wales Law Reform Commission made a tentative recommendation in its Working Paper that all powers of attorney should be enduring whether or not the donor stated this intention. However, the Commission changed its position on this issue in its final Report.

[167] *Infra*, Chapter 6.

(4) Certificate of Legal Advice

We have already referred to the importance of ensuring that donors are given sufficient information to assist them in understanding the nature and effect of granting an EPA.[168] We consider it essential that the proposed legislation make provision for this. How exactly this is to be achieved has been one of the most difficult questions we have considered in this Report.

One option is to require that donors obtain legal advice prior to signing the EPA. This could be achieved by having the donor acknowledge before a lawyer that he or she understands the nature and effect of signing the EPA, or by having the lawyer certify that this advice has been given. This would be modeled on the requirement contained in the *Matrimonial Property Act*.[169]

Of the jurisdictions which we examined, New South Wales is the only one to have adopted this approach.[170] The N.S.W. Act provides that EPAs must be witnessed by a "prescribed person" (defined as a clerk of petty sessions, a barrister or a solicitor),[171] who must certify in writing that he or she explained the effect of the instrument to the donor prior to its being executed.[172]

The Institute received a number of submissions which supported this type of requirement. The most common suggestion was that EPAs should be executed before a lawyer (or a notary public), who would be required to complete an Affidavit of Execution certifying, *inter alia*, that independent legal advice had been given to the donor.

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[168] *Supra*, at 30 and 36.

[169] R.S.A. 1980, c. M-9, s. 38. See also the *Dower Act*, R.S.A. 1980, c. D-38, s. 5(2); *Guarantees Acknowledgment Act*, R.S.A. 1980, c. G-12, s. 3.

[170] Some States in the U.S.A. require EPAs to be executed before a notary public, but there appears to be no requirement that the notary public certify that independent legal advice has been given - see American College of Probate Counsel, *supra*, note 30. This is also true of the Uniform Act 1988. Likewise, s. 6(2) of the South Australia Act provides that an EPA must be witnessed by someone who is authorized by law to take affidavits, but there is no requirement of a certificate of legal advice.

[171] S. 163F(2); Conveyancing Regulations, Gazette Dec. 21, 1984, No. 178.

[172] The Law Reform Commission of the Republic of Ireland recommended that an EPA should state that the donor has either received independent legal advice or, having been advised of the wisdom of taking such advice, has declined to do so - Irish Report at 20.

After much reflection, we have concluded that this type of requirement should be adopted. Although it is a departure from the overall simplicity of the scheme, we believe that this departure is necessary and justifiable in view of the importance of advising donors of the legal implications of signing an EPA. We propose, therefore, that every EPA be accompanied by a certificate of legal advice signed by a lawyer. The lawyer should be someone other than the attorney or the attorney's spouse (including "common law" spouse).

In our view a requirement that the lawyer explain the nature and effect of an EPA is too vague. We prefer a more specific approach, involving the use of explanatory notes. This is discussed in the next section of this Chapter.

Since our proposal will involve the donor having to attend before a lawyer, we believe that this should also be used to provide evidence of execution and of the donor's competence. Accordingly, we propose that the certificate of legal advice contain a statement that the donor signed (or acknowledged having signed) the EPA in the presence of the lawyer, that the donor acknowledged that the EPA was signed voluntarily, and that the donor appeared competent to grant the EPA.

RECOMMENDATION 7

We recommend that the proposed legislation require that an enduring power of attorney be accompanied by a certificate of legal advice in prescribed form, signed by a lawyer who is not the attorney or the attorney's spouse (including "common law" spouse), stating that:

(a) the donor attended before the lawyer providing the certificate;

(b) the donor appeared competent to grant the power of attorney;

(c) (i) the donor signed the power of attorney (or acknowledged his or her signature) in the presence of the lawyer, and acknowledged having signed voluntarily, or

(ii) the power of attorney was signed on behalf of the donor as provided in Recommendation No. 3, in the presence of the lawyer and the donor, and the donor acknowledged that he or she was physically incapable of signing and that his or her direction to sign was given voluntarily; and

(d) the lawyer satisfied himself or herself that the donor understood the explanatory notes referred to in Recommendation No. 8.

(5) Explanatory Notes

(a) Rationale

Another possible method of informing the donor of the implications of signing an EPA involves a series of explanatory notes which must be incorporated into the EPA. The purpose of the notes is to explain, in language comprehensible to the layperson, the basic nature and effect of an EPA. England, Northern Ireland and New Zealand have adopted this approach. The legislation in these countries prescribes a mandatory form for EPAs, and the form contains a series of notes explaining the implications of signing an EPA. This approach has also been proposed by the Australian Law Reform Commission,[173] the Law Reform Commission of the Republic of Ireland,[174] and by the National Conference of Commissioners on Uniform State Laws in the United States.[175]

We have already concluded that the goal of informing donors as to the implications of an EPA is best achieved by means of a certificate of legal advice. However, we also believe that explanatory notes can play a useful role in that process. Although explanatory notes have been used in other jurisdictions as an alternative to certificates of legal advice, in our view the two approaches should be combined. Thus, as is set out in Recommendation No. 7, we propose that the lawyer providing the certificate be required to satisfy himself or herself that the donor understands the explanatory notes. The primary advantage of this use of explanatory notes is that it focuses the lawyer's attention on what must be understood by the donor, thus making the lawyer's task simpler and less expensive. It also provides the donor with a written explanation of the legal implications of an EPA, which the donor will have for future reference.

One problem with the way in which explanatory notes have been adopted in other countries is that they are linked to the use of a prescribed form. Unlike some jurisdictions, where the legislation merely provides a suggested form, the legislation in England, Northern Ireland and New Zealand requires the EPA to be in a prescribed form, which incorporates the explanatory notes.[176] This ensures that the notes are brought to the attention of the donor before the EPA is executed. However, the use of a prescribed form introduces a degree of rigidity which is inappropriate in the context of an EPA. A power of attorney is a flexible instrument, which can be designed to meet a variety of different situations. The task of drafting a prescribed form which is sufficiently adaptable, yet at the same time not too vague as to be meaningless, may well prove exceptionally difficult. There is some evidence of this problem in England. In recommending against a prescribed form, the Newfoundland Law Reform Commission quoted from the following submission which it had received, commenting on the English experience:[177]

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[173] Australian Report at 11-12 and 33-38.

[174] Irish Report at 10.

[175] Uniform Act 1988.

[176] In England and New Zealand the legislation permits departures from the prescribed form so long as these are "immaterial" - English Act, s. 2(6); New Zealand Act, s. 95(2). See also Practice Direction [1989] 2 All E.R. 64 (Ct. of Protection). The N. Ireland Order does not contain this provision.

> [I]t seems to me that the adoption of the policy of prescribing a standard form for enduring powers of attorney was probably a mistake. Clearly it was intended to be a powerful measure of consumer protection, by containing a full explanation of the effects of a power, addressed both to the donor and to the attorney. However, it has proved exceedingly difficult to promulgate a satisfactory form. In the short life of the Act, we have had two forms. The first has been abandoned because it was generally considered to be unsatisfactory, and the second has also met with criticisms, although fewer...It seems clear that the joint objectives of a reasonably flexible scheme under which powers can be granted to meet different situations, with individually designed limitations and full statutory explanations in the form are probably incompatible. I was therefore glad to read that you were not proposing a standard form, and I would urge your Commission to abide by that conclusion.

We believe that this problem can be avoided. There is no reason why the explanatory notes must be linked to the use of a prescribed form - the two requirements are quite distinct. We agree that it would be unwise to attempt to prescribe a mandatory form of EPA. But this does not militate against the use of explanatory notes. In our view every EPA (regardless of what forms it takes) should be required to incorporate a series of explanatory notes, setting out the essential nature and effect of the instrument.

RECOMMENDATION 8

We recommend that the proposed legislation require every enduring power of attorney to include a series of explanatory notes, setting out the essential nature and effect of the instrument.

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[177] Newfoundland Report at 27.

(b) Content

What advice should the explanatory notes contain? By way of example, we think it useful to quote the New Zealand notes in their entirety:[178]

> 1. The effect of this document is to authorise the person you have named as your attorney to act on your behalf in respect of your affairs in relation to your property. As you will see from the form, you can authorise your attorney to act in respect of all your property affairs, or only some of them. If you want the attorney to act in respect of some of them only, you must specify which they are.
>
> 2. You must also indicate whether you wish this document to be effective even while you are mentally capable and to continue if you become mentally incapable, or whether you want it to have effect only if you become mentally incapable.
>
> 3. You should consider very carefully what conditions you may wish to impose on the attorney's right to act to his or her own benefit or to the benefit of other persons. Subject to anything you may state in this document, the attorney may act in such a way as to benefit the attorney or other persons if you might be expected to provide for the needs of the attorney or those other persons. The attorney will also be able to make seasonal gifts and charitable donations on your behalf.
>
> 4. Before signing this document, you should seek legal advice.

In England and Northern Ireland the explanatory notes[179] are more detailed and, in our opinion, more complex. This is partly due to the fact that the notes attempt to summarize the registration requirement contained in the legislation.[180] However, the notes also address a wider range of issues than those in New Zealand, including the appointment of joint or joint and several attorneys, and the attorney's right to claim remuneration and reimbursement of expenses.

We believe that it is neither practicable nor advisable for the explanatory notes to attempt to cover all the significant implications of an EPA. The information should be kept to a minimum, and should address only the most important aspects of an EPA. In our view the notes should cover the following six points:[181]

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[178] New Zealand Act, Third Schedule.

[179] Enduring Power of Attorney (Prescribed Form) Regulations 1987, SI 1987/1612; Enduring Power of Attorney Regulations (Northern Ireland) 1989, SI 1989/64.

[180] See *infra*, at 54-6.

(1) They should explain the basic purpose of a power of attorney.

(2) They should emphasize the extent of the attorney's authority and the need to consider whether or not that authority should be restricted. This is particularly important in view of the recommendation which we make later in this Report, namely, that in certain circumstances attorneys should be able to use the donor's property to benefit themselves or third parties.[182]

(3) They should explain that the EPA will continue after the mental incapacity of the donor. Reference should also be made to the fact that, once the donor becomes mentally incapable, the attorney comes under a duty to manage the donor's affairs and cannot resign without leave of the court. We discuss this point later in this Report.[183]

(4) They should explain that the EPA takes effect immediately unless the donor provides otherwise, and that the donor can create what is known as a "springing power of attorney", that is, one which takes effect only when the donor becomes mentally incapable. We examine this concept in detail in Chapter 6.

(5) They should inform donors of their right to revoke the EPA at any time before they become mentally incapable.

(6) They should advise donors of the necessity of obtaining the attorney's consent to the appointment.

RECOMMENDATION 9

We recommend that the explanatory notes referred to in Recommendation No. 8 be as follows:

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[181] In drafting the explanatory notes, it has been necessary to anticipate some of the recommendations which we make later in this Report.

[182] *Infra*, at 75-7.

[183] *Infra*, at 67-71 and 96-7.

NOTES ON THE ENDURING POWER OF ATTORNEY

Read These Notes Before Signing This Document

1. The effect of this document is to authorize the person you have named as your attorney to act on your behalf with respect to your property and financial affairs.

2. Unless you state otherwise in the document, your attorney will have very wide powers to deal with your property on your behalf. The attorney will also be able to use your property to benefit your spouse and dependent children. You should consider very carefully whether or not you wish to impose any restrictions on the powers of your attorney.

3. This document is an "enduring" power of attorney, which means that it will not come to an end if you become mentally incapable of managing your own affairs. At that point your attorney will have a duty to manage your affairs, and will not be able to resign without first obtaining permission from the court. The power of attorney comes to an end if you or your attorney dies.

4. This document takes effect as soon as it is signed and witnessed. If you do not want your attorney to be able to act on your behalf until after you become mentally incapable of managing your own affairs, you should state this in the document.

5. You can cancel this power of attorney at any time, so long as you are still mentally capable of understanding what you are doing.

6. You should ensure that your attorney knows about this document and agrees to being appointed as attorney.

(6) Non-Compliance with Formalities

(a) Effect of non-compliance

The formalities of execution which we have recommended are mandatory, in the sense that an instrument cannot be an EPA unless it complies with them. However, non-compliance should not in itself prevent an otherwise valid instrument from being a power of attorney (albeit a non-enduring one). Non-compliance should not render the instrument void; it should only prevent it from being an EPA. Other Canadian provinces have adopted this approach, and we believe that the proposed legislation should do likewise.

RECOMMENDATION 10

We recommend that the proposed legislation provide that the prescribed formalities apply only to enduring powers of attorney, and that failure to comply with these formalities should not in itself prevent an otherwise

valid instrument from being a power of attorney (albeit a non-enduring one).

(b) Waiver

In several jurisdictions the EPA legislation provides that the statutory safeguards cannot be waived by the donor.[184] We believe that this provision should be adopted in the proposed legislation. The formalities which we have recommended are not mere procedural technicalities; they are substantive safeguards designed to protect the interests of the donor.[185] Given that one of their functions is to minimize the risk of exploitation and undue influence,[186] we do not believe that the donor should be able to waive these formalities.[187]

RECOMMENDATION 11

We recommend that the proposed legislation should provide that the prescribed formalities apply notwithstanding any agreement or waiver to the contrary.

(c) Conflict of laws

Unless the proposed legislation provides otherwise, the prescribed formalities will apply to all EPAs which are governed by Alberta law. We must therefore consider whether the legislation should make provision for some of the conflicts issues which may arise. For example, if an EPA is executed in Ontario, and complies with Ontario (but not Alberta) formalities, can the attorney exercise authority after the incapacity of the donor, in respect of real property situated in Alberta? If the donor moves to Alberta (after incapacity), and the attorney wishes to manage the donor's affairs in Alberta, is the EPA terminated because it does not comply with Alberta formalities?

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[184] Ontario Act, s. 4; New Brunswick Act, s. 58.7; P.E.I. Act, s. 4; Tasmania Act, s. 11F.

[185] See the Newfoundland Report at 71.

[186] See *supra*, at 35.

[187] For waiver in the context of the court's supervisory powers over the attorney, see *infra*, at 74 and 105.

The conflicts rules relating to agency are reasonably well settled.[188] As between the agent and the principal, their mutual rights and obligations are governed by the proper law of the agency (which will usually be the law of the place where the contract of agency, or power of attorney, is executed). However, the rights and obligations of the agent and principal *vis a vis* a third party are governed by the proper law of the contract entered into with the third party. In particular, the question of whether the agent's authority is terminated by the mental incapacity of the principal must be determined with respect to each contract entered into by the agent, and is governed by the proper law of that contract.

Applying these principles in the context of an EPA, it becomes evident that unexpected consequences may arise. Consider the first example given above - the Ontario attorney who wishes to deal with real property situated in Alberta. The question of whether the attorney's authority has been terminated by the donor's incapacity is governed by the proper law of the proposed contract, which would likely be the law of Alberta as the *lex situs*. Since the power of attorney is not an EPA as defined in the proposed legislation, because it does not comply with the prescribed formalities, Alberta law would probably regard the attorney's authority as having been terminated by the donor's incapacity, even although the instrument complies with the EPA formalities in the place where it was executed.[189] The same result would obtain in the second example given above - where the Ontario donor moves to Alberta. Regardless of whether a power of attorney is a valid EPA in the place where it was executed, it cannot be used in transactions governed by Alberta law after the donor has become mentally incapable, unless it also complies with Alberta formalities. Since the proposed legislation prescribes a formality which is not found in any other Canadian province (namely, a certificate of legal advice), this condition is unlikely to be satisfied.

In our view this position is unsatisfactory and should be corrected by legislation. If an instrument is a valid EPA according to the law of the place where it is executed, it should be regarded as such by the law of Alberta notwithstanding that it does not comply with the formalities prescribed in the proposed legislation.

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[188] See J.-G. Castel, *Canadian Conflict of Laws* (2nd ed., 1986) at 562-4; *Dicey and Morris on the Conflict of Laws* (11th ed., 1987), vol. 2, at 1339-1347; J.G. McLeod, *The Conflict of Laws* (1983) at 505-7.

[189] It is possible that the court would avoid this result, by holding that Alberta law determines whether an EPA is terminated by the donor's incapacity, but that the law of the place where the instrument is executed determines whether it is an EPA.

RECOMMENDATION 12

We recommend that the proposed legislation provide that, notwithstanding the formalities of execution prescribed in the legislation, an instrument is an enduring power of attorney if, according to the law of the place where it is executed,

(a) it is a valid power of attorney, and

(b) the attorney's authority thereunder is not terminated by the subsequent mental incapacity or infirmity of the donor.

D. Registration

The question of whether there should be a requirement that EPAs be registered, either with the court or with some central registry, has given rise to a sharp division of opinion. Law reform agencies in Ontario, Manitoba, England, Tasmania and South Africa recommended in favour of mandatory registration; those in British Columbia, Newfoundland, New South Wales and the Australian Capital Territory were against it.

The approach taken by legislatures has been more uniform : very few jurisdictions have adopted mandatory registration for EPAs.[190] Of those which have, England provides by far the most striking example. The English Act[191] prescribes an elaborate scheme of registration. A duty to register the EPA arises once the attorney has reason to believe that the donor is (or is becoming) mentally incapable. The attorney must "as soon as practicable" apply to the Court of Protection to register the EPA, having first given notice of the application to the donor and to the donor's near relatives (unless the court dispenses with the requirement of notice). The legislation provides a number of grounds on which the application can be opposed, such as the EPA was obtained by fraud or undue influence, or the donor is not yet mentally incapable, or the attorney is unsuitable to act as the donor's attorney. If an objection is made and is upheld, the court must refuse the registration and can revoke the power.

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[190] The N. Territory Act, s. 13 provides that an EPA is revoked by the donor's incapacity unless it has been registered in the General Registry Office. The Tasmania Act, s. 6 provides that all powers of attorney must be registered under the Registration of Deeds Act. A registration requirement also exists in some States in the U.S.A., but this usually applies only where the attorney wishes to deal with real property - see American College of Probate Counsel, *supra*, note 30.

[191] Ss. 4-8. The N. Ireland Order is identical in almost all material respects to the English Act.

The English Act also provides that, once the donor becomes mentally incapable, the attorney cannot exercise authority under the EPA until it is registered with the court, except in very limited circumstances (for example, to maintain the donor or to prevent loss to the estate). The attorney's full authority is restored only once the EPA is registered. The court then has supervisory powers over the attorney, including the power to give directions as to the management of the estate, and the power to order the attorney to pass accounts.

These provisions implement the recommendations of the English Law Commission.[192] It is clear that the Law Commission regarded registration primarily as a means of ensuring compliance with the notice requirement. It stated that:[193]

> Since this proposal would involve notifying the donor's closest relatives - usually those who would know him best - any doubts about the attorney or the EPA could be aired before the attorney began acting unsupervised. And the absence of objections from relatives, following the opportunity to express any they might have, would indicate a degree of satisfaction on their part with the arrangements made by the donor.

The Australian Law Reform Commission described the English registration scheme as "far too elaborate".[194] We agree. In our view the potential benefits of such a scheme cannot possibly justify the added complexity and expense which it imposes.[195] We also doubt the importance of its underlying purpose, namely, to bring the existence of the EPA to the attention of the donor's relatives. We think it highly likely that in most cases the existence of the EPA will already be known, and we do not feel that it is justifiable to impose such a complicated scheme to deal with the minority of cases where the relatives are unaware of the EPA.

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[192] Although not evident from the English Report itself, at least one member of the Law Commission disagreed with the recommendations on registration, believing them to be "excessively complex" - see S.M. Cretney, *The Programmes: Milestones or Millstones*, in G. Zellick (ed.), The Law Commission and Law Reform (1988) 3 at 13 note 38.

[193] English Report at 19.

[194] Australian Discussion Paper at 8. But see the Irish Report at 12, which described the English registration scheme as "highly satisfactory" and recommended its adoption in Ireland.

[195] The Australian Report (at 8) commented that the English scheme for EPAs "is so complicated that it is virtually impossible to use one without professional legal help".

The English scheme has the advantage of making the attorney's appointment subject to review by the court once the donor has become mentally incapable. However, this can be achieved without the necessity of mandatory registration. In particular, we recommend later in this Report that any interested person be at liberty to apply to the court to have the attorney's appointment reviewed and, if necessary, revoked.[196]

It would be wrong to reject the notion of mandatory registration purely on the basis of an examination of the English Act. The English registration scheme is an extreme example, and it would certainly be possible to devise a much less elaborate model. For example, the Ontario Law Reform Commission recommended that the attorney should be required to register a notarial copy of the EPA with Registrar of the Surrogate Court within 15 days of first learning of the donor's incapacity, failing which the attorney could not validly exercise the power. The Commission observed that "we cannot stress too strongly the importance of filing a copy of the power of attorney".[197] It explained its reasoning as follows:[198]

> The requirement that attorneys must file a notarial copy of the power with the surrogate court office performs a useful function. It puts the power of attorney on public record, and, more importantly, publicly identifies the attorney. This not only protects the attorney, but also enables interested parties to inform themselves of the existence of the power.

The purpose of this scheme, and a similar one proposed by the Manitoba Law Reform Commission[199] (neither of which was implemented in the legislation), is simply to make the EPA a matter of public record. We do not believe that this is sufficiently important to justify requiring registration in every case. Provision already exists for a power of attorney to registered at the Land Titles Office.[200] The donor and the attorney are free to avail themselves of this provision if they so choose, and thereby make the power of attorney a matter of public record. But we do not see why they should be compelled to do so. We conclude, therefore, that the proposed legislation should not require an EPA to be registered.

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[196] *Infra*, at 91-4.

[197] Ontario Report at 26.

[198] *Id.*

[199] Manitoba Report at 12. The two schemes were not identical. The Manitoba recommendation was that the attorney register the EPA within 15 days *of its execution*, with the Registrar of the Surrogate Courts *and with the Public Trustee's Office*.

[200] *Land Titles Act*, R.S.A. 1980, c. L-5, s. 115.

RECOMMENDATION 13

We recommend that the proposed legislation should not impose a mandatory registration requirement for enduring powers of attorney.

E. Reviewing the Attorney's Conduct

The extent to which the proposed legislation should make provision for reviewing the attorney's conduct (for example, by enabling interested persons to apply for an accounting, and empowering the court to remove the attorney) is considered later in this Report.[201]

F. Other Possible Safeguards

Law reform agencies have canvassed a number of other safeguards and restrictions, some of which have been implemented in legislation. In this section of the Report we look at these other possible safeguards, with a view to deciding whether any of them ought to be incorporated into the proposed legislation.

(1) Mental Capacity

A power of attorney is void if, at the time of its execution, the donor lacks the requisite mental capacity to grant it.[202]

We believe that the proposed legislation should codify this common law rule. This would have two advantages. The first is that it would make clear that, although the legislation permits an EPA to survive the mental incapacity of the donor, it does not change the common law rule that the donor must have capacity when the instrument is executed. In most jurisdictions this is implied in the EPA legislation, but in our view it should be the subject of express provision.

The second advantage is that it would provide an opportunity to clarify what the requisite mental capacity is for granting a power of attorney. We believe that such clarification is necessary in light of the differing views which have been expressed as to the appropriate test for determining whether a person has the capacity to grant a power of attorney. Some authorities equate it with testamentary capacity,[203] others with contractual capacity.[204] It has also been stated that the law requires a higher degree of mental capacity for the execution of a power of attorney than for a will,[205] but this has been doubted by the Alberta Court of Appeal.[206]

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[201] *Infra*, at 72-4 and 91-4.

[202] *Daily Telegraph Newspaper Co.* v. *McLaughlin* [1904] A.C. 776 (P.C.); Bowstead, *supra*, note 31 at article 4.

[203] *Hrycan Estate* v. *Hrycan* (1986) 49 Sask. R. 277 (Q.B.).

The most recent, and most comprehensive, discussion of the issue is to be found in *Re K.*,[207] a decision of the English Court of Protection. The case involved an application to register an EPA with the court pursuant to section 4 of the English Act.[208] The donor's relatives objected to the registration, on the ground that the EPA was invalid because the donor had lacked the requisite capacity to execute it. In dismissing the relatives' objections, the court held that an EPA is valid if the donor is capable of understanding the nature and effect of the juristic act by which the power is conferred. The court stated that the donor does not have to be capable of managing his or her own property and affairs on a regular basis; nor must the donor be capable of understanding the nature and effect of the acts which the attorney is authorized to perform.[209] According to the court in *Re K.*, the donor has the requisite capacity if he or she is capable of understanding (1) that the attorney will be able to assume complete authority over the donor's affairs; (2) that the attorney will have the authority to do anything with the donor's property which the donor could have done; (3) that the authority will continue even if the donor becomes mentally incapable, and (4) that, in the event of the donor's incapacity, the EPA will be irrevocable.

In our view *Re K.* is correct in holding that the true test of capacity in the present context is whether the donor is capable of understanding the nature and effect of the instrument.[210] Such a test is consistent with the fundamental principle that legal capacity

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[204] Bowstead, *supra*, note 31 at article 4; English Report at 3-4.

[205] *Mason* v. *Campbell; Re Campbell* (1932) 5 M.P.R. 341 (P.E.I.C.A.).

[206] *McCardell's Estate* v. *Cushman* (1988) 94 A.R. 262 at 263 (C.A.). See also Simmonds, *supra*, note 58 at 129-30.

[207] *Supra*, note 41.

[208] The details of the English registration scheme are discussed *supra*, at 54-6.

[209] For the contrary view see N.S.W. Report at 14-15; *Ranclaud* v. *Cabban* (1988) NSW Conv. R. 55-385, 57-548, referred to in the Australian Report at 9-10; R. Munday, "The Capacity to Execute an Enduring Power of Attorney in New Zealand and England: A Case of Parliamentary Oversight?" (1989) 13 *New Zealand Universities Law Review* 253.

[210] Munday, *supra*, note 209, submits that the decision in *Re K.* is incorrect and that its reasoning is based on a misunderstanding of the law of agency. However, though critical of the reasoning, Dr. Munday appears to support the result, for he

(continued...)

is task specific; incapacity in one area does not necessarily mean incapacity in another.[211] Thus, the mere fact that a person is incapable of managing his or her own affairs does not *necessarily* mean that the person lacks the capacity to grant a valid EPA. The correct approach is to focus on the person's capacity to understand the specific juristic act in question: is the person capable of understanding the nature and effect of granting an EPA? In our view, the proposed legislation should adopt this as the test for capacity to grant an EPA.

RECOMMENDATION 14

We recommend that the proposed legislation provide that an enduring power of attorney is void if, at the date of its execution, the donor is mentally incapable of understanding its nature and effect.

(2) Minimum Age

We are not in favour of prescribing a minimum age for donors of EPAs.[212] As long as they are mentally capable of understanding the nature and effect of appointing an attorney under an EPA, donors[213] should be permitted to do so, regardless of age.[214]

RECOMMENDATION 15

We recommend that the proposed legislation should not prescribe a minimum age for donors of enduring powers of attorney.

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[210](...continued)
recommends that the legislation be amended to give effect to the decision in *Re K*. The Australian Law Reform Commission agreed with the test propounded in *Re K* and recommended that it be incorporated into the EPA legislation - see Australian Report at 9-11.

[211] See M. Silberfeld *et al.*, "A Competency Clinic for the Elderly at Baycrest Centre" (1988) 10 *Advocates' Quarterly* 23 at 24; Robertson, *supra*, note 59 at 3.

[212] The Fram Committee, *supra*, note 65 at 95, recommended that donors be over the age of 18. No other law reform report recommended such a requirement, nor is one contained in any of the EPA statutes which we examined.

[213] The issue of whether there should be a minimum age for attorneys is discussed *infra*, at 61.

[214] At common law, a minor probably has the capacity to execute a power of attorney - see Bowstead, *supra*, note 31 at article 4.

(3) Disqualified Attorneys

We have already considered the question of whether certain individuals should be ineligible as witnesses to the execution of an EPA.[215] A similar issue arises with respect to attorneys - should the proposed legislation disqualify particular individuals or groups from acting as an attorney under an EPA?

Legislation in some jurisdictions does exclude certain individuals from being appointed as an attorney. These generally fall into one of two categories. The first comprises people who are considered untrustworthy, or who occupy a position of power or authority over the donor and whose appointment as attorney may therefore be the product of undue influence. The *Community Care Facility Act*[216] in British Columbia is an example of this type of disqualification. The Act provides that no licensee or employee of a community care facility shall act under the authority of a power of attorney granted by a resident of the facility, and the power of attorney and any disposition under it are void, unless either the licensee or employee is the child, parent or spouse of the resident, or the Public Trustee consents in writing to the power of attorney or the disposition.

Like other law reform agencies which have considered the issue,[217] we see no justification for this type of disqualification. It would be invidious to single out individuals or groups and suggest that they are untrustworthy. It is the donor who should decide whether the attorney is someone who can be trusted. Nor do we think that individuals should be excluded simply because they are in a position to exercise influence over the donor. In many cases such a rule would exclude the very people who are most likely to act in the donor's best interests; for example, close relatives and friends.

The second category of exclusion comprises individuals who are perceived as being incapable of effectively performing the functions of an attorney. For example, the legislation in England,[218] Northern Ireland[219] and New Zealand[220] provides that an attorney (other than a trust company) must be over the age of majority[221] and must not be bankrupt. The New Zealand Act also disqualifies individuals who are the subject of a guardianship or trusteeship order.[222]

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[215] *Supra*, at 41-3.

[216] R.S.B.C. 1979, c. 57, s. 12(2)(g) [en. 1982, c. 43, s. 5].

[217] See B.C. Report at 28-30; Newfoundland Report at 59-60; Tasmania Report at 16; English Working Paper at 38-42.

[218] English Act, s. 2(7).

[219] N. Ireland Order, s. 4(6).

[220] New Zealand Act, s. 95(3).

In our view an age restriction would serve little practical purpose. We think it highly unlikely that a donor would appoint a minor as an attorney.[223] In any event, we are not convinced that such an appointment would necessarily be unsuitable. We would be hesitant to say that a seventeen year old necessarily lacks the ability to manage someone else's affairs: we prefer to leave that to the judgment of the donor.

With respect to mental incapacity of the attorney, the common law provides that persons who are incapable of understanding what they are doing cannot act as an agent.[224] We see little point in codifying this common law rule. We think it extremely unlikely that a donor would appoint an attorney who was mentally incapable of understanding the nature and effect of the appointment. Moreover, we recommend later in this Report that an EPA should terminate if the attorney's estate becomes subject to trusteeship under the *Dependent Adults Act*.[225] We therefore consider it unnecessary for the proposed legislation to contain a disqualification based on mental incapacity.

We recommend later in this Report that an EPA should not terminate on the bankruptcy of the attorney.[226] The same reasoning leads us to the conclusion that the proposed legislation should not prevent a bankrupt from being appointed as an attorney under an EPA.

We conclude, therefore, that the proposed legislation should not place any restrictions on who can be appointed as attorney under an EPA. In reaching this conclusion, we have taken into consideration the recommendations which we make later in this Report with respect to the court's power to remove an attorney under an EPA.[227] If an attorney is perceived as unsuitable, any interested person can apply to the court to have the attorney removed, and the court will decide the issue based on what it considers to be in the best interests of the donor. We consider that this is the most appropriate way to deal with the question of whether someone is an unsuitable attorney.

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[221] This was also recommended by the Newfoundland Law Reform Commission - see Newfoundland Report at 62.

[222] New Zealand Act, s. 95(3).

[223] Such an appointment would not be void at common law : a minor does not lack capacity to act as an agent - see Bowstead, *supra*, note 31 at article 5; Halsbury's Laws of England (4th ed.), vol. 1, para. 709.

[224] Bowstead, *supra*, note 31 at article 5; Fridman, *supra*, note 131 at 49.

[225] *Infra*, at 103.

[226] *Infra*, at 103.

RECOMMENDATION 16

We recommend that the proposed legislation should not place any restrictions on who can be appointed as an attorney under an enduring power of attorney.

(4) Mandatory Joint Attorneys

In its Working Paper, the English Law Commission made a tentative recommendation that an EPA should have a minimum of two attorneys, who would have to act jointly. It was felt that this would reduce the risk of mismanagement and exploitation, because each attorney would provide a check on the conduct of the other.

The Law Commission changed its position on this issue in its final report, and concluded that the legislation should not require there to be two attorneys.[228] A requirement of two joint attorneys was also considered and rejected by the law reform commissions in British Columbia,[229] Newfoundland,[230] Tasmania,[231] and the Republic of Ireland.[232]

In our view the arguments against requiring a minimum of two attorneys are compelling. Such a requirement interferes with the autonomy of the donor; if the donor is content to entrust his or her affairs to one attorney, why should the legislation dictate otherwise? It also introduces additional complexity and inconvenience, and (as with any scheme requiring joint action) creates a potential for disagreement, stalemate and inaction. Moreover, its underlying premise - that two heads are better than one - is at best questionable. We conclude, therefore, that the proposed legislation should not require that there be a minimum of two attorneys.

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[227] *Infra*, at 91-4.

[228] English Report at 18.

[229] B.C. Report at 28.

[230] Newfoundland Report at 60-61.

[231] Tasmania Report at 16.

[232] Irish Report at 7.

RECOMMENDATION 17

We recommend that the proposed legislation should not require that an enduring power of attorney appoint a minimum of two attorneys.

(5) Limitations on Value of the Estate

In the United States, the Model Act proposed in 1964 by the National Conference of Commissioners on Uniform State Laws recommended that a financial limit be placed on the value of estates which could be subject to an EPA.[233] It was felt that some estates, by virtue of their size and complexity, were not suited to management by means of an EPA.

This type of limitation was considered and rejected by the English Law Commission.[234] The Law Commission expressed the opinion that:[235]

> A limit on the property to which a scheme for an enduring power of attorney could apply would involve making an arbitrary distinction between estates deemed suitable for this means of management, and those deemed unsuitable, based entirely on size or value. We think it would be extremely difficult to decide what the limit should be, and any limit might deprive many people who reasonably wished to take advantage of such a scheme of the opportunity of doing so, whilst not guaranteeing that enduring powers were not granted in unsuitable cases.

We agree with the Law Commission's reasoning, and with its conclusion that this type of limitation "would create more problems than it would solve".[236] We recommend that the limitation not be adopted in Alberta.

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[233] The exact amount was not specified, this decision being left to individual enacting States - see English Working Paper at 37. The Model Act now appears to be redundant in view of the Uniform D.P.A. Act which was adopted by the Commissioners in 1979 - see *supra*, note 30. The Uniform D.P.A. Act contains no financial limit.

[234] English Report at 29-30. For more detailed discussion see English Working Paper at 35-8.

[235] English Working Paper at 36-7.

[236] *Id.* at 38.

RECOMMENDATION 18

We recommend that the proposed legislation should not place a financial limit on the value of estates which can be the subject of an enduring power of attorney.

(6) Limitations on Duration

Should a time limit be placed on the duration of an EPA? Such a limitation was contained in the EPA legislation in California, introduced in 1979, which provided that an EPA continued for only one year after the donor became mentally incompetent.[237] This limitation was removed by amending legislation in 1981.[238]

The concept of a statutory time limit on EPAs has not been adopted in any other jurisdiction which we examined, and it has been expressly rejected by a number of law reform agencies. In our view it should not be adopted in Alberta. As is pointed out by the Newfoundland Law Reform Commission,[239] there is no evidence to support the limitation's underlying premise, namely, that EPAs should be seen as a short term solution and are not suitable in cases of long term management. Also, there would be considerable problems involved in setting the time limit. How long should it be - one year, two years, five years? The decision is necessarily arbitrary. From what date should the time limit run? If the date of incapacity were used, this would create the difficult problem of ascertaining the exact moment that the donor became mentally incapable. If the date of execution were used, "it is possible that the power might terminate just after the onset of incapacity : before it has done any good, but beyond the period when the principal could have granted a new enduring power".[240]

We conclude that the proposed legislation should not place a time limit on the duration of EPAs. Donors can, of course, insert such a clause in the EPA if they so choose. But we do not believe that the legislation should restrict the freedom of donors who do not wish to limit their EPA in this way.

RECOMMENDATION 19

We recommend that the proposed legislation should not place a time limit on the duration of enduring powers of attorney.

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[237] California Civil Code, s. 2307.1.

[238] Cal. Stat. 1981, c. 511; see H. Spitler, "California's "New" Durable Power of Attorney Act - The Second Time Around" (1981) 3 *CEB Est. Plan. R.* 41.

[239] Newfoundland Report at 57-8.

[240] *Id.* at 58.

G. Conclusion

The requirements which we have recommended, relating to the execution of an EPA, can be summarized as follows: the instrument must be signed by (or on behalf of) the donor, who must be mentally capable of understanding its nature and effect; it must contain a statement indicating its enduring nature; and it must be accompanied by a certificate of legal advice.

In our view these recommendations strike a proper balance between simplicity and formality. We believe that the proposed scheme is simple and straightforward, and offers a practical and accessible method of planning for incapacity. Yet at the same time, when taken in conjunction with our later recommendations with respect to monitoring the attorney's conduct, the scheme contains adequate safeguards to protect the interests of the donor.

CHAPTER 5 - POWERS AND DUTIES OF THE ATTORNEY

A. Nature of the Attorney's Duties

As with all agents, an attorney has a duty to exercise reasonable care when acting under the power of attorney. The applicable standard of care depends on whether the attorney acts gratuitously or for reward. Agents for reward must exercise such skill, care and diligence as is reasonably necessary for the proper performance of the duties undertaken by them, and, if acting in the course of a profession, they must display normal professional competence. The standard of care expected of gratuitous agents is that which would ordinarily be exercised by persons in the conduct of their own affairs.[241]

In addition to their duty of care, attorneys have an obligation of loyalty and utmost good faith arising from the fiduciary nature of the agency relationship. As fiduciaries, they must make full disclosure to the donor of all material facts which place or may place them in a position of conflict of interest. They must not use their position, or confidential information derived from it, to secure personal gain, or use the donor's property for their own benefit, without the informed consent of the donor.[242] Attorneys also have a duty to keep their own property separate from that of the donor, and to maintain an accurate account of all transactions entered into on the donor's behalf,[243] and they cannot delegate their authority without the express or implied consent of the donor.[244]

Some law reform agencies have taken the view that the attorney's duties should be set out in the EPA legislation.[245] We disagree. The nature and extent of the attorney's duties are well established, and we see no reason to incorporate them into the proposed legislation. However, we believe that the legislation should address two particular duties. One is the duty to act; the other is the duty to account.

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[241] See generally Bowstead, *supra*, note 31 at articles 42 and 44; Fridman, *supra*, note 131 at 140-44; Halsbury's Laws of England (4th ed.), vol. 1, paras. 776-78.

[242] See generally Bowstead, *supra* n. 31 at articles 45-50; Fridman, *supra*, note 131 at 152-63; M.V. Ellis, *Fiduciary Duties in Canada* (1988), c. 3.

[243] This is discussed more fully *infra*, at 71-2.

[244] See generally Bowstead, *supra*, note 31 at article 35; Fridman, *supra*, note 131 at 144-46.

[245] Australian Report at 31-2; Fram Committee, *supra*, note 65 at 99.

B. Duty to Act

(1) Common Law Position

In the absence of a contractual undertaking by the attorney, a power of attorney imposes no obligation on the attorney to exercise the authority which it confers. The attorney has the power to act, but no duty to do so. The common law position is summarized by Professor Fridman as follows:[246]

> Where the agency relationship is non-contractual, that is to say it is the result of agreement but is gratuitous, then the agent is not obliged to perform the undertaking at all: and he will not be held liable for failure to do so, ie non-feasance: though he will be liable for a negligent performance of the undertaking...

There exists the possibility that, although gratuitous attorneys have no contractual duty to exercise their authority, failure to do so may give rise to liability in tort. If the attorney undertakes to act on the donor's behalf, knowing that the donor will rely on this undertaking (for example, by not appointing someone else as attorney), the law of tort may impose a duty on the attorney to perform the undertaking.[247] However, there is no case-law directly on point, and thus the position remains unclear.

(2) Should There be a Statutory Duty?

A number of law reform agencies have considered whether legislation should impose a duty on attorneys to exercise their authority under an EPA. The Law Reform Commission of British Columbia recommended in favour of such a duty, but this was not implemented in the legislation.[248] The Commission took the view that, without such a duty, the appointment of an attorney under an EPA "may be an act of futility".[249] Law reform agencies in Newfoundland,[250] South Australia,[251] and Tasmania[252] also concluded that EPA attorneys should have a statutory duty to exercise their authority.

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[246] *Supra*, note 131 at 138. See also Bowstead, *supra*, note 31 at article 44.

[247] See Bowstead, *supra*, note 31 at article 44; J.G. Fleming, *The Law of Torts* (7th ed., 1987) at 136-139; A.M. Linden, *Canadian Tort Law* (4th ed., 1988) at 271-75.

[248] The Commission has raised the issue again in its most recent study of EPAs - see B.C. Working Paper at 24-6.

[249] B.C. Report at 31.

The reasoning underlying this conclusion is that the legislation should give effect to the reasonable expectations of the donor. In granting an EPA, donors are planning for their own incapacity, with the expectation that the attorney will manage their affairs once they become mentally incapable of doing so themselves. That expectation may easily be frustrated if the attorney is under no legal duty to exercise the authority conferred by the EPA.

On the other hand, law reform agencies in England,[253] New South Wales,[254] the Australian Capital Territory[255] and the Republic of Ireland[256] recommended against the imposition of a statutory duty to act. Although it had tentatively supported such a duty in its earlier working paper, the English Law Commission concluded in its final report that the "problems that such a duty would solve would, we feel, be heavily outweighed by those it would create".[257] In particular, the Commission was of the view that: the duty would be onerous and compliance would be difficult; the duty would be unrealistic where the attorney was a close relative of the donor, particularly an elderly relative; its existence might deter people from consenting to act as attorney under an EPA; and its scope would be unclear; for example, would it extend to attending to the needs of the donor's dependents?

In our opinion these arguments do not outweigh, let alone "heavily" outweigh, the case for imposing a statutory duty to act. We doubt whether such a duty will deter many people from consenting to act as an EPA attorney. Even if it does, it is far preferable that they decline the appointment rather than leave the donor's affairs "in limbo" after incapacity. Nor do we perceive the duty as onerous, difficult, or unrealistic. On the contrary, we believe that it reflects the understanding and expectations of most

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[250] Newfoundland Report at 63-70.

[251] South Australia Report at 11. See also South Australia Act, s. 7.

[252] Tasmania Report at 16; Tasmania Working Paper at 98-105. See also Tasmania Act, s. 11C.

[253] English Report at 41-2.

[254] N.S.W. Report at 31.

[255] Australian Report at 31-2.

[256] Irish Report at 13.

[257] English Report at 42.

EPA donors and attorneys. If, in a particular case, the duty to manage the donor's affairs does prove to be onerous or difficult for the attorney, the attorney can apply to the court to be relieved of that duty.[258] Finally, the prospect of the scope of the duty being unclear can easily be addressed in the legislation.

We conclude that the proposed legislation should impose a duty to act. The expectation that the attorney will manage the donor's affairs after incapacity is basic to the concept of an EPA, and in our view the legislation should reflect this. However, the imposition of a statutory duty to act should be subject to any provision to the contrary in the EPA. Donors should be free to relieve the attorney from such a duty if they so choose.

(3) Nature and Scope of the Duty

A statutory duty to act can be achieved in a number of different ways. For example, the legislation can provide that the attorney is deemed to be a trustee. This approach has been adopted in Tasmania[259] and recommended by the Newfoundland Law Reform Commission.[260]

We do not favour this approach. In our view many of the provisions of the *Trustee Act*[261] are inappropriate in the context of an EPA. For example, we do not believe that attorneys should be subject to the investment limitations which apply to trustees.[262] The *Trustee Act* also empowers the court to vary the terms of the trust (including the trustee's powers) and to appoint a substitute trustee.[263] We recommend later in this Report that the court should not have these powers in respect of an EPA.[264]

It would, of course, be possible for the legislation to provide that an attorney under an EPA is a trustee but that certain of the provisions of the *Trustee Act* (such as those outlined above) do not apply.[265] However, this strikes us as a rather cumbersome way of imposing a duty to act. We prefer a more direct approach, modeled on the legislation in South Australia,[266] which provides that attorneys must exercise their powers with reasonable diligence to protect the interests of the donor.[267]

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[258] See *infra*, at 96-7.

[259] Tasmania Act, s. 11C.

[260] Newfoundland Report at 63-70.

[261] R.S.A. 1980, c. T-10.

[262] *Id.* ss. 5-10.

[263] See e.g. ss. 14(2), 21, and 42.

[264] *Infra*, at 94-6.

[265] See the Newfoundland Report at 66-70.

In our view the attorney's duty should be restricted to protecting the interests *of the donor*. Later in this Report[268] we recommend that attorneys should, in certain circumstances, be able to exercise their powers for the benefit of persons other than the donor (including themselves); for example, the donor's dependents. However, we do not believe that the power to benefit others should be converted into a duty to do so. This would place too onerous an obligation on the attorney. The statutory duty to act should be restricted to protecting the interests of the donor.

(4) When Should the Duty Arise?

In every jurisdiction which imposes a statutory duty to act (either directly or by means of a trustee provision), the duty arises once the donor becomes mentally incapable of managing his or her affairs. The Law Reform Commission of British Columbia rejected this approach, because of the difficulties involved in determining incapacity. Instead, the Commission recommended that the duty should arise immediately the EPA is executed, but that it should be subject to any explicit instructions given by the donor while competent.[269]

Neither approach is free from difficulty. On balance, however, we prefer the date of incapacity rather than the date of execution. We believe that this more accurately reflects the wishes of most EPA donors. As we discuss in Chapter 6,[270] experience in other jurisdictions indicates that many donors do not want their attorneys to have the power to act (let alone a duty to act) until after incapacity. Moreover, as the B.C. Report itself recognizes,[271] its proposal would not necessarily avoid the problems associated with determining incapacity. The donor's duty would be subject to the directions of the donor only if the donor were competent, and thus the attorney might still have to make a determination as to the donor's mental capacity.

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[266] South Australia Act, s. 7.

[267] We view this as similar to the recommendation made in the B.C. Report (at 31) that attorneys be subject to a duty of "prudent management".

[268] *Infra*, at 75-7.

[269] B.C. Report at 31-2.

[270] *Infra*, at 79.

[271] See B.C. Report at 32.

We conclude that the statutory duty to act should arise when the attorney knows, or ought to know, that the donor is mentally incapable of managing his or her affairs (unless, of course, the EPA has already been terminated; for example, by the appointment of a trustee under the *Dependent Adults Act*).[272] Rather than referring to "mental incapacity", the statutory provision should use the terminology of the *Dependent Adults Act*, that is, inability to make reasonable judgments concerning the estate.[273]

One final qualification should be added. In our view the statutory duty to act should not be imposed unless the attorney has accepted the appointment as attorney, either expressly (for example, by signing or acknowledging the EPA) or by implication (for example, by acting in pursuance of the EPA). It would be manifestly unfair to impose such a duty on someone who had not agreed to act as attorney. Even although the power of attorney would probably have no legal effect in the absence of the attorney's express or implied consent,[274] we believe that the proposed legislation should make it clear that the duty to act arises only if the attorney has accepted the appointment.

RECOMMENDATION 20

We recommend that the proposed legislation provide that where an attorney has acted in pursuance of an enduring power of attorney, or has otherwise indicated acceptance of the appointment, and the power of attorney has not been terminated, the attorney has a duty (unless the power of attorney provides otherwise) to exercise his or her powers to protect the donor's interests during any period in which the attorney knows, or ought to know, that the donor is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate.

C. Accounting

(1) Attorney's Duty

It is well established that an attorney has a duty to maintain accurate accounts of all transactions entered into on behalf of the donor, and to furnish these to the donor if requested.[275]

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[272] See *infra*, at 97-9.

[273] R.S.A. 1980, c. D-32, s. 25.

[274] See Bowstead, *supra*, note 31 at article 8.

[275] *Whitford* v. *Whitford* [1941] 2 D.L.R. 701 (N.S.S.C. *en banc*), reversed in part on other grounds [1942] S.C.R. 166; Bowstead, *supra*, note 31 at articles 51-2; Halsbury's Laws of England (4th ed.), vol. 1, para. 780.

The existence of this duty, and the right to enforce it by means of an action for accounting, ensure that the donor is able to monitor the attorney's conduct under the power of attorney. However, this depends on the donor having the mental capacity (1) to make an informed decision whether to request accounts from the attorney, (2) to understand the accounts, or to seek professional assistance in understanding them, and (3) to revoke the power of attorney if the accounts indicate mismanagement on the part of the attorney. Obviously, if the donor loses this mental capacity, the duty to account *to the donor* becomes meaningless. In our view the proposed legislation should address this problem.

(2) Mandatory Accounting

We do not believe that the solution lies in requiring the attorney to bring in and pass accounts with the court at periodic intervals after the donor becomes mentally incapable. Several of the submissions which we received stressed that the strict accounting requirements which the *Dependent Adults Act* imposes on trustees should not be applied to EPA attorneys.[276] We agree. In our view the best approach (and one adopted in most jurisdictions) is to empower the court, on the application of any interested party, to direct that the attorney provide an account of transactions entered into on behalf of the donor.

(3) Application for an Accounting

(a) Accounting period

The exact scope of the accounting provision varies in different jurisdictions. The Ontario Act illustrates the most common approach. Section 9 of the Act entitles any person interested in the donor's estate, and any other person with leave of the court, to apply for an order directing the attorney to pass accounts. However, the application may be brought only if the donor is "without legal capacity", and the order to pass accounts is restricted to transactions entered into during the incapacity of the donor.[277]

In our consultations with Ontario's Public Trustee and with the Advocacy Centre for the Elderly, we were informed that section 9 is ineffective and is rarely used in practice. One of the main problems relates to the limitation mentioned above; the court can only order the attorney to pass accounts in respect of transactions entered into during the donor's incapacity. This requires the court to determine when the donor became mentally incapable, and the necessary evidence to make this determination is often unavailable. As a result, the donor may in fact have been mentally incapable long before the date set by the court, but transactions during this period are not covered by the accounting.

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[276] The Dependent Adults Act, R.S.A. 1980, c. D-32, s. 31(3) provides that a trustee, other than the Public Trustee, must file accounts with the clerk of the court, and apply to the court for an order passing the accounts, at least once every two years. Under s. 31(3.1) [en. 1985, c. 21, s. 27(b)], the court can dispense with accounting for a period not exceeding four years.

[277] For similar provisions see the New Brunswick Act, s. 58.5; Nova Scotia Act, s. 7(1)(a); P.E.I. Act, s. 9.

The EPA legislation in some of the Australian States overcomes this problem by empowering the court to direct the attorney to pass accounts in respect of any or all of the transactions entered into on behalf of the donor, including those prior to the donor's incapacity.[278] We believe that the proposed legislation should adopt this approach. The court should have the discretion to grant whatever order for accounting it considers appropriate in the circumstances.

(b) Who may apply?

In our view the donor should be entitled to apply for an accounting at any time; so should the donor's trustee under the *Dependent Adults Act*, and personal representative after the donor's death. This simply reflects the common law position. The Surrogate Court appears to us to be the appropriate forum for such an application.

The proposed legislation should also make provision for other interested persons to apply. The term "interested person" is usually given a broad interpretation by the courts,[279] and in the present context would include anyone having a *bona fide* interest in the conduct of the attorney. However, to ensure the widest possible standing, we propose that the legislation provide that any interested person, and any other person with leave of the court, may apply.

We consider that it would be an unwarranted invasion of the donor's privacy to enable an application to be brought, other than by the donor, prior to the donor's incapacity. Indeed, there is no reason to provide for others to apply for an accounting order, if the donor has that right and is mentally capable of deciding whether to exercise it. Thus, we agree with the position in other jurisdictions, that the application should be brought only if the donor has become mentally incapable.[280] As in the case of the duty to act,[281] we prefer to express this limitation by using the terminology of the *Dependent Adults Act* - an application may be brought if the donor is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate. The legislation should also require that notice of the application be served on the donor (unless the court dispenses with this requirement) and on the Public Trustee.

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[278] N. Territory Act, s. 15(2); South Australia Act, s. 11(1) [am. 1988, No. 80, s. 3]; Tasmania Act, s. 11E(1).

[279] See *Consumers' Gas Company* v. *Public Utilities Board* [1971] 3 W.W.R. 37 (Alta. C.A.).

(c) Waiver

Our proposals with respect to accounting are aimed at protecting the interests of the donor, particularly in respect of mismanagement and abuse on the part of the attorney. We do not believe that the donor should be able to waive these provisions. The legislation should guard against the risk of donors waiving the accounting provisions as a result of undue influence when executing the EPA.[282]

RECOMMENDATION 21

We recommend that the proposed legislation provide that:

(a) The donor of an enduring power of attorney, or the donor's personal representative or trustee appointed under the *Dependent Adults Act*, may apply to the Surrogate Court by way of originating notice for an order directing the attorney to bring in and pass accounts in respect of any or all transactions entered into in pursuance of the power of attorney.

(b) An application referred to in paragraph (a) may also be brought by any interested person, and by any other person with leave of the Court, if the donor is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate.

(c) A copy of the application and order shall be served on the donor (unless the Court dispenses with this requirement), the attorney, and the Public Trustee (unless the person to be served is the applicant).

(d) The Court may grant whatever order for accounting it considers appropriate in the circumstances.

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[280] Of the jurisdictions which we examined, only South Australia provides that an application may be brought by interested persons prior to the incapacity of the donor - see South Australia Act, s. 11(1) [am. 1988, No. 80, s. 3].

[281] See *supra*, at 71.

[282] New South Wales is the only jurisdiction whose legislation provides that the donor can waive the accounting provisions - see N.S.W. Act, s. 163G(5). Several jurisdictions have an express provision to the contrary - see Ontario Act, s. 4; New Brunswick Act, s. 58.7; P.E.I. Act, s. 4; Tasmania Act, s. 11F.

(e) These provisions apply notwithstanding any agreement or waiver to the contrary.

D. Attorney's Powers

(1) Statutory Limits

One of the submissions which we received raised the question of whether the EPA legislation should limit the attorney's powers in the same way that a trustee's powers are limited by the *Dependent Adults Act*. This would require attorneys to obtain the authorization of the court before exercising certain powers; for example, the power to dispose of the donor's real property, or personal property over a prescribed value.[283]

We do not favour a restriction of this type. Unlike the dependent adult, the donor of an EPA has the opportunity, while still mentally competent, to decide the scope of the attorney's authority. Donors are free to modify the attorney's powers by including limitations in the instrument. If they choose not to do so, we see no reason why the legislation should restrict the attorney's powers.

In the United States, the Uniform Act 1988 requires donors to indicate expressly which powers they intend to confer on the attorney. The statutory form prescribed by the Act has a list of potential powers, and the attorney acquires only those which are initialled by the donor.[284] We prefer the opposite approach; an attorney under a general EPA should have all the powers of a general attorney (that is, the power to do on behalf of the donor anything which the donor can lawfully do by an attorney), subject to any limitation or restriction contained in the instrument.[285]

RECOMMENDATION 22

We recommend that the proposed legislation provide that an attorney under an enduring power of attorney has authority to do on behalf of the donor anything which the donor can lawfully do by an attorney, subject to any conditions or restrictions in the instrument creating the power.

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[283] See the Dependent Adults Act, s. 30 [am. 1985, c. 21, s. 26].

[284] Uniform Act 1988, s. 1.

[285] For similar provisions see B.C. Act, s. 8(2) [en. 1987, c. 42, s. 91]; Ontario Act, s. 2; P.E.I. Act, s. 2; English Act, s. 3(2); N. Ireland Order, s. 5(2); New Zealand Act, s. 97(2); N.S.W. Act, s. 163B(1); South Australia Act, s. 5(3); Tasmania Act, s. 11B(2).

(2) Power to Benefit Others

We have already noted that, because of the fiduciary nature of the relationship, attorneys cannot use their powers other than for the benefit of the donor, without the informed consent of the donor.[286] The English Law Commission considered that this restriction should be relaxed in limited circumstances. The Law Commission felt that to deny the attorney the power to benefit persons other than the donor "would deprive the EPA of much of its practical utility".[287]

The Law Commission's recommendations on this issue were implemented in the English Act. The Act provides that, subject to any conditions or restrictions contained in the instrument, an attorney may act under an EPA so as to benefit persons other than the donor (including the attorney), if the donor might be expected to provide for the needs of those persons. The attorney may do whatever the donor might be expected to do to meet those needs.[288] The Act also makes provision for "seasonal gifts" to the donor's relatives and others connected with the donor, and gifts to charities to whom the donor made or might be expected to make gifts, provided that the value of each gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate.[289] Similar provisions are contained in the legislation in New Zealand[290] and Northern Ireland.[291]

We agree that, to a limited extent, attorneys should be able to exercise their authority so as to benefit persons other than the donor. Attorneys should not be left without authority to attend to the needs of the donor's spouse and dependent children. This principle has been accepted in the context of a trustee appointed under the *Dependent Adults Act*. The Act provides that trustees may exercise their authority for the maintenance, education, benefit and advancement of the dependent adult's spouse and minor children (and disabled adult children), and that of any other person with the consent of the court.[292] We believe that the proposed legislation should contain a modified version of this provision. The attorney's power to benefit others should be restricted to the donor's spouse and dependent children, but the proposed legislation (unlike the *Dependent Adults Act*) should not authorize the court to extend the attorney's powers beyond this.

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[286] *Supra*, at 66.

[287] English Report at 28.

[288] English Act, s. 3(4).

[289] *Id.* s. 3(5).

[290] New Zealand Act, s. 107.

[291] N. Ireland Order, ss. 5(4) and 5(5). The Law Reform Commission of the Republic of Ireland has recommended the adoption of the English provisions - see Irish Report at 12.

[292] R.S.A. 1980, c. D-32, s. 32(2).

We do not believe that the legislation should make express provision for "seasonal" gifts or charitable donations. As with the *Dependent Adults Act*, the attorney's authority to benefit others should be confined to providing for their maintenance, education, benefit and advancement. If the donor wishes the attorney to make gifts which fall outside the scope of this authority, the donor should make express provision for this in the EPA.

Our proposed legislation makes it clear that attorneys may exercise their powers to benefit themselves if they fall within the class of specified dependents (for example, if the attorney is the donor's spouse).[293] Some may feel that the prospect of attorneys being able to use the EPA for their own benefit creates a significant risk of abuse. We disagree. We doubt that the existence of this power will materially increase the risk of fraudulent misappropriation; the proposed provision will neither assist nor encourage unscrupulous attorneys. Nor do we believe that *bona fide* attorneys are likely to be misled by the legislation and assume that they have an unfettered discretion to dissipate the donor's estate for the benefit of themselves and others. In our view the limitations and conditions in the proposed provision are sufficiently clear to disabuse *bona fide* attorneys of this view.

RECOMMENDATION 23

We recommend that the proposed legislation provide that, subject to any conditions, restrictions or additions in the instrument creating the power, an attorney under an enduring power of attorney may exercise his or her authority for the maintenance, education, benefit and advancement of the donor's spouse and dependent children (including the attorney).

(3) Ademption

An attorney under an EPA has the potential to affect the interests of beneficiaries under the donor's will. In particular, if the will contains a specific legacy of property, that legacy may be adeemed if the attorney disposes of the property. Should the proposed legislation contain a provision to protect the interests of beneficiaries?

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[293] It is unlikely that the attorney would be a dependent child of the donor.

The legislation in South Australia was amended in 1988 to include such protection.[294] The Act empowers the court, on application by any interested party, to make such orders as it thinks fit to ensure that no beneficiary gains a disproportionate advantage, or suffers a disproportionate disadvantage, as a result of the attorney's exercise of authority under the EPA. The court order takes effect as if it were a codicil to the donor's will.

In our view the proposed legislation should not address this issue. Ademption resulting from the act of someone other than the testator is not an issue which is peculiar to EPAs. For example, a disposition by a trustee under the *Dependent Adults Act* can result in the ademption of a legacy.[295] We believe this to be a matter which should be considered in the context of reform of the law of ademption as a whole, rather than in the limited context of EPAs.

RECOMMENDATION 24

We recommend that the proposed legislation should not address the issue of ademption of specific legacies resulting from the act of an attorney under an enduring power of attorney.

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[294] South Australia Act, s. 11a [en. 1988, No. 80, s. 4].

[295] See Robertson, *supra*, note 59 at 186-87.

CHAPTER 6 - SPRINGING POWERS OF ATTORNEY

A. Postponing the Attorney's Authority

As a means of planning for incapacity, an EPA has one possible drawback - it takes effect from the moment of execution. Thus, although its underlying purpose is to enable the attorney to act *after* the donor becomes mentally incapable, it confers immediate authority on the attorney.

In some cases this arrangement may reflect the needs of the donor. Although possessing the necessary mental capacity to grant a valid EPA,[296] the donor may already be experiencing difficulty in managing his or her own affairs and may require the immediate assistance of an attorney. However, what of other cases, where the donor is still fully capable of handling financial matters? In this type of situation, there is no need for the attorney to have immediate authority, and the donor may be reluctant to grant it. The Law Reform Commission of British Columbia points out that:[297]

> Experience demonstrates, however, that an appreciable number of persons who use the enduring power of attorney are anxious to arrange matters so that it does not have the effect of conferring authority on the attorney from the time of its creation. Their preference is to allow the authority to remain dormant so long as the principal is if full capacity but to allow the instrument to operate with full vigor when he ceases to be of full capacity.

What is required in these cases is a mechanism for postponing the attorney's authority until it is needed. In this Chapter we consider how this may be achieved, and whether the issue should be addressed in the proposed legislation.

B. Existing Techniques

(1) Physical Custody

Experience in other jurisdictions indicates that two techniques are often employed in practice to postpone the attorney's authority. The first involves the physical custody of the instrument.[298] The donor executes the EPA, and then gives the instrument to a third party (for example, a solicitor) on the understanding that it will not be released to the attorney until the donor becomes mentally incapable.

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[296] See *supra*, at 57-9.

[297] B.C. Working Paper at 4.

[298] See B.C. Working Paper at 10-1; Simmonds, *supra*, note 58 at 131-32.

This arrangement does not involve the creation of a contingent ("springing") power of attorney. The instrument is a conventional EPA, which takes effect immediately upon execution. Its operation is postponed, however, by the simple device of depriving the attorney of possession of the instrument until the donor becomes mentally incapable. This device relies on the practical reality that third parties will not be willing to deal with attorneys who cannot furnish written evidence of their authority.

This arrangement presents some problems, which are aptly summarized by the B.C. Law Reform Commission:[299]

> This approach is not free of difficulty. It is necessary to involve an additional person to retain custody of the instrument while the power is suspended. That person must, moreover, make a determination when it is appropriate to give the attorney possession of the instrument. If that determination requires the custodian to make some judgment as to the principal's mental state, the question arises whether a duty of care is owed and to whom. Depending on the answers, the custodian of the instrument may find himself exposed to liability for a bad judgment call.

We view this technique as an acceptable arrangement which donors should be free to utilize if they so choose, but one which should not be formalized in the proposed legislation. Moreover, we think it unlikely that many donors will opt for this method of postponing the attorney's authority, in view of the recommendations which we make later in this Chapter with respect to springing powers of attorney.

(2) Springing Powers of Attorney

The other technique which has developed in practice is for the EPA to provide that it comes into effect only upon the occurrence of a specified contingency; for example, the mental incapacity of the donor.[300] This is usually referred to as a "springing" power of attorney. The authority which it confers remains in abeyance until the occurrence of the specified contingency, at which point it "springs" into effect.

The obvious problem with this approach is how one determines when the contingency has occurred. If, for example, the instrument were to provide that it takes effect on the mental incapacity of the donor, third parties would want proof of the donor's incapacity before dealing with the attorney. It is unlikely that they would be willing to accept the opinion of the attorney (or even a physician), but rather would insist that the mental incapacity of the donor be determined by a court. This, of course, would defeat the very purpose of the instrument as a means of planning for incapacity without court intervention.

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[299] B.C. Working Paper at 11.

[300] See B.C. Working Paper at 11-3; Simmonds, *supra*, note 58 at 132.

In an attempt to overcome this problem, a practice has developed in some jurisdictions whereby the springing power of attorney specifies not only the contingency upon which it will take effect, but also how the occurrence of that contingency is to be determined. A common example is for the instrument to provide that it will take effect upon the mental incapacity of the donor, which is to be conclusively determined by the written opinion of one or more named physicians. In effect, the triggering event is the physician's opinion rather than the incapacity of the donor. Thus, third parties need not be concerned about whether the donor is indeed mentally incapable -their only concern is whether the named physician has determined this to be the case.

C. The Need for Legislation

There appears to be no reason in principle why a donor cannot grant a power of attorney which is contingent upon a specified future event, with the power remaining in abeyance until the occurrence of that event. Indeed, there is case-law which supports the concept.[301]

In view of this, it can be argued that there is no need for the proposed legislation to deal with the issue. We do not accept this. We believe that it is important that the proposed legislation make express provision for springing powers of attorney.

An express statutory provision would remove any doubt that donors can grant a power of attorney which is contingent upon their own incapacity. As the Law Reform Commission of British Columbia has emphasized,[302] the effectiveness of a power of attorney depends upon the willingness of third parties to rely on the attorney's authority. Regardless of what the true legal position may be, if third parties have any doubts about the validity of springing powers of attorney, there will be little point in donors granting them.

Experience in other jurisdictions, particularly New York, indicates that in the absence of express statutory provision, third parties may be reluctant to deal with an attorney under a springing power of attorney. This was one of the main reasons which led the New York Law Revision Commission to recommend that that State's EPA legislation be amended to include express provision for springing powers of attorney.[303] That recommendation was implemented in 1988.[304]

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[301] *Sinclair* v. *Dewar* (1872) 19 Gr. 59 (Ont. C.A.).

[302] B.C. Working Paper at 12.

Although we are not aware of similar problems in Canada,[305] we believe that the validity of springing powers of attorney should be placed beyond doubt by means of express provision in the proposed legislation.

Another reason for dealing with this issue in the legislation is that it will alert members of the legal profession to the existence of springing powers of attorney, and thus assist them in advising clients as to the most appropriate method of planning for incapacity. If the legislation were to remain silent on this issue, it is possible that some lawyers might be unaware of the concept of a springing power of attorney as an option in planning for incapacity.

D. Legislation in Other Jurisdictions

(1) Uniform D.P.A. Act

In most jurisdictions the EPA legislation makes no express provision for springing powers of attorney. In those which do, the most common approach is for the legislation to contain no more than a simple enabling provision. For example, the Uniform D.P.A. Act[306] in the United States provides that a power of attorney may stipulate that it shall become effective upon the disability or incapacity of the donor.[307] A similar provision is contained in the legislation in South Australia[308] and Tasmania,[309] and in the draft legislation proposed by the South African Law Commission[310] and the Australian Law Reform Commission.[311]

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[303] See New York Report at 231.

[304] Laws of New York, 1988 Regular Session, c. 210, para. 1, replacing General Obligations Law para. 5-1602 (in force July 31, 1988).

[305] Canadian EPA legislation makes no express provision for springing powers of attorney. However, amendments based on the New York model have recently been recommended by the Law Reform Commission of British Columbia - see B.C. Working Paper.

[306] S. 1.

[307] Most States have adopted, or expanded, this provision. However, the legislation in four States (Connecticut, Illinois, Ohio and South Carolina) expressly prohibits the creation of a springing power of attorney - see S.J. Schlesinger, "Use of Powers of Attorney and Joint Bank Accounts in Planning for the Management of the Property of the Aging or Incapacitated Client", in D.P. Callahan & P.J. Strauss (eds.), *Estate Planning for the Aging or Incapacitated Client* (Practising Law Institute, 1986) 63 at 112.

(2) New York

A much more detailed provision is contained in the New York legislation. The Act provides, *inter alia*, that:[312]

> An instrument granting a power of attorney may limit such power to take effect upon the occurrence of a specified contingency, including but not limited to the incapacity of the principal, provided that the instrument requires that a person or persons named in the instrument declare, in writing, that such contingency has occurred. A power limited as provided in the preceding sentence shall take effect upon the written declaration of the person or persons named in the instrument that the specified contingency has occurred without regard to whether the specified contingency has occurred.

It is interesting that this provision *requires* that a person be named to determine when the contingency has occurred. As we discuss later in this Chapter,[313] we do not believe that such a requirement should be adopted.

(3) British Columbia

The issue of springing powers of attorney was the subject of a recent study by the Law Reform Commission of British Columbia. The Commission recommended that the following section be added to the B.C. Act:[314]

> 7.1(1) A power of attorney may stipulate that it takes effect at a specified future time.

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[308] South Australia Act, s. 6(1) [am. 1988, No. 80, s. 2].

[309] Tasmania Act, s. 11A(1).

[310] South African Report at 52.

[311] Australian Report at 13 and 34.

[312] Laws of New York, General Obligations Law para. 5-1602(2) [re-en. 1988, c. 210, para. 1].

[313] *Infra*, at 85.

[314] B.C. Working Paper at 28.

> (2) A power of attorney may stipulate that it takes effect on the occurrence of a specified event or contingency including, but not limited to, the subsequent mental infirmity of the donor.
>
> (3) A power of attorney described in subsection (2) may name one or more persons on whose written declaration the specified contingency or event is conclusively deemed to have occurred for the purpose of bringing the power of attorney into effect.
>
> (4) A person referred to in subsection (3) may be the attorney appointed in the instrument.

Unlike the New York legislation, the B.C. proposal permits, but does not require, the donor to name a person who will determine when the contingency has occurred. It is interesting, however, that if the donor does not name such a person, the B.C. proposal contains no mechanism for determining when the contingency has occurred.

E. Our Proposals

(1) Provision for Springing Powers

Having concluded that the proposed legislation should make provision for springing powers of attorney, we must now decide how this should be achieved. In our view the provision should address a number of issues.

Its primary aim should be to enable donors to grant a power of attorney which will take effect in the event of their mental incapacity or infirmity. However, it should also enable donors to specify other circumstances upon which an EPA is contingent. For example, a person who is about to travel abroad may wish to grant a power of attorney which will take effect in the event of his or her return being delayed. The donor may also wish to ensure that the power will continue in the event of mental incapacity (for example, the donor might be involved in an accident while on vacation and be rendered mentally incapable). The donor in this example would therefore wish to grant an EPA contingent upon his or her return to Canada being delayed. We believe that the proposed legislation should facilitate this type of arrangement. The donor should be able to specify any contingency, including but not limited to mental incapacity or infirmity, upon which the EPA will take effect.

We also believe that the safeguards which apply to a "conventional" EPA (that is, one which takes effect immediately) should apply equally to a power of attorney which takes effect upon the mental incapacity or infirmity of the donor. In both cases the justification for safeguards is the same. Regardless of when the attorney's authority takes effect, it is the continuation of that authority after the donor's incapacity that gives rise to the need for safeguards. It is essential, therefore, that powers of attorney which are contingent upon the donor's mental incapacity or infirmity be subject to the same formalities and safeguards as conventional EPAs.

In the draft legislation in Part IV of this Report, we have defined an EPA as a power of attorney which, *inter alia*, contains a statement indicating either that it is to continue notwithstanding the donor's subsequent mental incapacity or infirmity, or that it is to take effect upon the mental incapacity or infirmity of the donor. This reflects one of the recommendations which we made in Chapter 4.[315] This definition will ensure that, where a power of attorney is contingent upon the donor's mental incapacity or infirmity, the power will be an "enduring power of attorney" as defined in the legislation. Thus, it will be subject to the same formalities and safeguards as apply to "conventional" EPAs.

(2) Occurrence of the Contingency

It is important that the proposed legislation contain more than a simple enabling provision with respect to springing powers of attorney. It should also make provision for determining when the contingency has occurred. Without this provision, third parties may be uncertain whether the power has taken effect and thus may be reluctant to deal with the attorney.

We agree with the basic philosophy of the B.C. proposal - donors should be permitted to specify a person who will conclusively determine when the contingency has occurred. We do not believe that this should be a requirement, as in the New York legislation. In our view this would be unduly restrictive. A donor should not be precluded from granting a springing power of attorney simply because he or she prefers not to designate a particular individual who will determine when the contingency has occurred.

The legislation should not place any restrictions on who can be named to perform this function. In particular, even although most springing EPAs will be contingent on the mental incapacity of the donor,[316] we do not believe that only physicians or other health care professionals should be permitted to determine when that contingency has occurred. If donors have sufficient confidence in someone's ability to judge when they are incapable of managing their affairs, they should be free to name that person in the power of attorney. Indeed, in many cases a family member, or close friend, who is familiar with the donor's habits and personality will be in a better position than a physician to judge when the donor is no longer capable of managing his or her affairs.

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[315] See *supra*, at 44.

[316] Some EPAs will involve other contingencies - see *supra*, at 84.

We also agree with the Law Reform Commission of British Columbia that the donor should be permitted to name the attorney as the person who will determine when the contingency has occurred.[317] We do not see any real risk of abuse or undue influence in such an arrangement. Rather than exert undue influence in an attempt to persuade the donor to name them as the arbitrator of incapacity, unscrupulous attorneys are far more likely to persuade the donor to grant an EPA which takes effect immediately. Moreover, there is little risk involved in the named person prematurely determining the donor to be mentally incapable. If the donor disagrees with this assessment, and is in fact still mentally capable, he or she can simply revoke the power of attorney.

One defect in the B.C. proposal is that it fails to make provision for the situation where the donor does not name a person who will decide when the contingency has occurred, or where the named person dies before the contingency occurs.[318] We believe that the legislation should contain a default provision, applicable to EPAs which are contingent on the mental incapacity or infirmity of the donor. If the power fails to name a person, or if the named person dies before it takes effect, the contingency should be deemed to have occurred upon the written declaration of two medical practitioners. We do not think it appropriate to apply this default provision to contingencies other than mental incapacity or infirmity, nor is it practicable to devise an alternative default provision for these cases. We do not view this gap as a serious problem, given that EPAs contingent on an event other than mental incapacity or infirmity are likely to be rare, and the occurrence of the contingency will often be readily apparent and easily established.

RECOMMENDATION 25

We recommend that the proposed legislation provide that:

(a) An enduring power of attorney may provide that it takes effect at a specified future time or on the occurrence of a specified contingency,

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[317] See *supra*, at 84.

[318] Where the named person dies before the contingency occurs (for example, before the donor becomes mentally incapable), the donor will usually be able to grant a new EPA naming another person. However, this will not always be the case. For example, the donor may become mentally incapable before learning of the named person's death, or they may be involved in an accident in which the named person dies and the donor is rendered mentally incapable.

including, but not limited to, the mental incapacity or infirmity of the donor.

(b) A power of attorney described in paragraph (a) may name one or more persons on whose written declaration the specified contingency is conclusively deemed to have occurred for the purpose of bringing the power of attorney into effect.

(c) A person referred to in paragraph (b) may be the attorney appointed under the power of attorney.

(d) Where the specified contingency referred to in paragraph (a) relates to the mental incapacity or infirmity of the donor, but

> **(1) the power of attorney does not name a person as provided in paragraph (b), or**
>
> **(2) the named person dies before the power of attorney takes effect,**

the specified contingency shall be conclusively deemed to have occurred, for the purpose of bringing the power into effect, when two medical practitioners declare in writing that it has occurred.

(3) Registration of Springing Powers

One of the submissions which we received identified some potential problems with respect to the registration of springing powers of attorney. In particular, the following three issues were raised:

(1) Should provision be made for the registration of a springing power of attorney (for example, at the Land Titles Office) prior to the occurrence of the specified contingency?

(2) What documentation should be registered to confirm the occurrence of the contingency?

(3) If a medical opinion is registered, confirming the mental incapacity of the donor, might this constitute a breach of doctor-patient confidentiality?

(a) Registration

In our view there is no reason for the proposed legislation to make provision for the registration of a springing power of attorney prior to the occurrence of the specified contingency. Until that occurrence, the attorney has no authority to act, and thus there is no point in giving notice to the public of the existence of the instrument. If the attorney purported to act prior to the occurrence of the contingency, we think it reasonable to expect that third parties would examine the power of attorney to confirm whether the attorney had authority. Such examination would reveal the power to be contingent, and third parties would then be expected to request satisfactory proof that the contingency had occurred.

It is not clear whether, under present legislation, a power of attorney which has not yet come into effect can be registered at the Land Titles Office.[319] Even if the instrument were accepted for registration, and the attorney purported to act under it in respect of the donor's real property, the Registrar's staff would examine the power of attorney to confirm whether the attorney had authority to act.[320] Presumably, in the absence of confirmation of the occurrence of the contingency, the Land Titles Office would refuse to register a transfer or other instrument signed by the attorney on the donor's behalf.

(b) Documentation

Once the contingency occurs, and the springing power of attorney comes into effect, it will be possible to register the instrument under the *Land Titles Act*. However, proof of the occurrence of the contingency will also have to be registered, to confirm that the power is in effect.

We foresee no problems with this. If the instrument names a person who is to determine when the contingency has occurred, that person's declaration can be registered along with the instrument. If there is no provision in the instrument for a named person, the declarations of two physicians (as provided for in our preceding recommendation) can be registered. In either case, there will be conclusive proof that the contingency has occurred, and this can be registered with the instrument.

We conclude, therefore, that there is no need for the proposed legislation to make special provision for the registration of springing powers of attorney.

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[319] The Land Titles Act, R.S.A. 1980, c. L-5, s. 115 provides for the registration of a "power of attorney". This could be interpreted as referring only to a power of attorney which is in effect, rather than one which is contingent upon the occurrence of a specified future event.

[320] See *Alberta Land Titles Procedures Manual* (Attorney General's Department, 1986), procedure # POA-1, para. E.

(c) Confidentiality

It is likely that most springing powers of attorney will be contingent upon the subsequent mental disability or incapacity of the donor. Confirmation that the donor has become mentally incapable may involve a physician disclosing information concerning the donor's mental health. Does this offend the rule of doctor-patient confidentiality?

In the absence of statutory authority, a physician (and other health care professionals) cannot disclose information about a patient without the patient's consent.[321] The problem in the present context is that by the time the physician is called upon to give an opinion as to the donor's mental capacity, the donor may be incapable of giving a valid consent to the release of the information. If the instrument expressly provides for a named physician to determine when the donor has become mentally incapable, this is likely to be interpreted as an implied consent by the donor to the release of confidential information. Nevertheless, it is possible that the physician might be reluctant to disclose the information in the absence of a more specific consent.

We believe that the proposed legislation should address this problem, by authorizing the release of information concerning the donor's mental and physical health for the purposes of confirming whether the specified contingency has occurred.

RECOMMENDATION 26

We recommend that the proposed legislation provide that, notwithstanding any restriction (whether statutory or otherwise) relating to the release of confidential health care information, where an enduring power of attorney is contingent upon the donor's mental incapacity or infirmity, information concerning the donor's mental and physical health may be released to the extent necessary for the purposes of confirming whether the specified contingency has occurred.

(4) Protection from Liability

In its recent working paper on EPAs, the Law Reform Commission of British Columbia raised the question of whether there should be statutory protection from liability (for example, no liability in the absence of bad faith) for individuals who are named in a springing power of attorney to determine when the contingency has occurred.[322] The Commission invited comments on whether the absence of statutory protection would deter people from agreeing to act as the "named person" in a springing power of attorney.

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[321] See E.I. Picard, *Legal Liability of Doctors and Hospitals in Canada* (2nd ed., 1984) at 7-24.

[322] B.C. Working Paper at 26.

In view of our recommendation that the contingency should be conclusively deemed to have occurred upon the named person's written declaration, we do not foresee any potential liability to third parties. It is possible that the named person might incur liability to the donor for any loss arising from a negligent determination that the contingency had (or had not) occurred. However, we doubt whether the absence of statutory protection will deter individuals from agreeing to act as a named person. In practice, the named person will likely be a close relative or friend of the donor, who will accept the designation regardless of statutory protection, or a professional person (such as a physician or solicitor) who is accustomed to having a legal duty to exercise reasonable care. We conclude, therefore, that it is unnecessary for the proposed legislation to afford protection from liability to named persons in a springing power of attorney.

CHAPTER 7 - TERMINATION

A. Revocation by the Donor

We noted in Chapter 4 that there is some evidence in other provinces that EPA donors often do not understand that they can revoke the power at any time before incapacity.[323] We have tried to address this problem in the explanatory notes which we have recommended must be referred to in the certificate of legal advice.[324] However, we believe that the issue should also be made clear in the proposed legislation. There should be an express provision that an EPA terminates if it is revoked by the donor,[325] provided that the donor has the necessary mental capacity. Although there does not appear to be any case-law directly on point, it would seem that the test of capacity in this context is whether the donor is capable of understanding the nature and effect of the revocation. This corresponds to the capacity required to grant an EPA, and is in keeping with the functional approach to mental capacity.[326]

RECOMMENDATION 27

We recommend that the proposed legislation provide that an enduring power of attorney terminates if it is revoked by the donor, provided that the donor is capable of understanding the nature and effect of the revocation.

B. Supervisory Powers of the Court

(1) Revocation

Several jurisdictions outside Canada provide that an EPA may be revoked by the court on the application of an interested person at any time after the donor has become mentally incapable of managing his or her affairs. For example, the New Zealand Act provides that the court may revoke the attorney's appointment if it is satisfied that the attorney has not acted, or is not acting, in the best interests of the donor.[327] Although not making express provision for revocation *per se*, some Canadian provinces empower the court to make an order substituting another person for the attorney named in the EPA.[328]

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[323] *Supra*, at 28-9.

[324] *Supra*, Recommendation 9, note 5.

[325] See Ontario Act, s. 7; New Brunswick Act, s. 58.2(2); Nova Scotia Act, s. 4; P.E.I. Act, s. 7; N. Territory Act, s. 17.

[326] See *supra*, at 59. It is also consistent with the test of capacity to revoke a will - see e.g. *Re McGinn Estate* (1969) 70 W.W.R. 159 (Alta. S.C.); *Re Beattie Estate* [1944] 3 W.W.R. 727 (Alta. Dist. Ct.); *Re Broome Estate* (1961) 35 W.W.R. 590 (Man. C.A.).

In our view revocation by the court is one of the most fundamental and necessary safeguards which ought to be included in EPA legislation. Once the donor has lost the mental capacity to monitor the attorney's conduct and to revoke the power, it is essential that there be a mechanism for reviewing the attorney's conduct and terminating the appointment. For example, there may be evidence of misappropriation or mismanagement by the attorney, or for some other reason it may be necessary to remove the attorney in order to protect the interests of the donor. We do not believe that the proposed legislation should attempt to specify the circumstances in which the court can terminate an EPA. The court's discretion should be broadly stated; it should have the power to terminate the EPA if it considers this to be in the best interests of the donor.

There is, of course, the possibility that such a broad discretion may invite frivolous or vexatious applications by disgruntled members of the donor's family. We believe, however, that the judicious exercise of discretion, and the court's jurisdiction over costs, will provide an effective safeguard against such claims.

As with our recommendations with respect to accounting,[329] we propose that the application be made to the Surrogate Court, by the donor,[330] any interested person, and any other person with leave of the court. The application should be permitted only if the donor is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate. An application prior to incapacity is unnecessary, since the EPA can be revoked by the donor.

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[327] New Zealand Act, s. 105. See also the English Act, s. 8(4); N. Ireland Order, s. 10(4); N.S.W. Act, s. 163G (application by donor only); N. Territory Act, s. 15(2); South Australia Act, s. 11(1) [am. 1988, No. 80, s. 3]; Tasmania Act, s. 11E; Victoria Act, s. 118. In South Australia and Victoria, the application may be brought prior to the donor's incapacity.

[328] Ontario Act, s. 10; New Brunswick Act, s. 58.6; Nova Scotia Act, s. 7(1)(c); P.E.I. Act, s. 10.

[329] See *supra*, at 73.

[330] Recommendation No. 21, which deals with applications for accounting, provides, *inter alia*, that an application may be brought by the donor's personal representative or trustee under the Dependent Adults Act. It is unnecessary to make the same provision with respect to an application to have the EPA terminated, since we recommend later is this Chapter that an EPA should terminate upon the death of the donor and upon a trusteeship order being granted in respect of the donor's estate - see *infra*, at 102 and 97-9.

The legislation should also contain a provision relating to notice of the application. In our view the applicant should be required to serve a copy of the application on the donor (unless the court dispenses with this requirement), on the attorney, and the Public Trustee. Since the application is brought at a time when the donor is (or is alleged to be) mentally incapable, it is important that the Public Trustee be aware of the application.

Later in this Chapter we recommend that an EPA should terminate upon a trusteeship order being granted under the *Dependent Adults Act* with respect to the donor's estate.[331] Accordingly, if the donor is mentally incapable, interested persons who consider that the EPA should be terminated can proceed in one of two ways. They can either apply for a trusteeship order under the *Dependent Adults Act*, or apply under the proposed legislation for an order terminating the EPA.

We do not consider that this creates unnecessary duplication. The most appropriate avenue for securing the termination of an EPA will normally be an application under the *Dependent Adults Act*. Unlike a trusteeship order, a termination order creates a void - it does not provide for the future management of the donor's estate[332] - and in most cases a subsequent application for a trusteeship order will be necessary to fill that void. However, applying for a termination order will sometimes be preferable to proceeding under the *Dependent Adults Act*. A termination order is ideally suited to emergency situations, where the removal of the attorney is immediately necessary to protect the donor's interests. The applicant need not be concerned with the suitability of a proposed trustee, the extent of the trustee's authority, the amount of security, the inventory of estate, and the myriad of other issues which must be addressed in preparing an application for a trusteeship order. We view the termination order as a quicker and simpler procedure for removing the attorney, and we believe that it will serve a useful function in emergency cases.

RECOMMENDATION 28

We recommend that the proposed legislation provide that:

(a) If the donor of an enduring power of attorney is unable to make reasonable judgments in respect of matters relating to all or part of his or

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[331] *Infra*, at 97-9.

[332] Later in this Chapter we recommend that the court should not have the power to appoint a substitute attorney - see *infra*, at 94-5.

her estate, the donor, any interested person, or any other person with leave of the Court, may apply to the Surrogate Court by way of originating notice for an order terminating the enduring power of attorney.

(b) A copy of the application and order shall be served on the donor (unless the Court dispenses with this requirement), the attorney, and the Public Trustee (unless the person to be served is the applicant).

(c) On hearing an application under paragraph (a), the Court may grant an order terminating the enduring power of attorney if it considers that this would be in the best interests of the donor.

(2) Substitution

In a number of jurisdictions, EPA legislation empowers the court to appoint a substitute attorney.[333] Indeed, as we have already noted, in some provinces the court cannot revoke the attorney's appointment without appointing a substitute.[334] The reasoning underlying these provisions is clear: if the donor is mentally incapable, removal of the attorney creates a void - there is no-one with authority to manage the donor's affairs - and so the court fills the void by appointing a substitute attorney.[335]

We share the view expressed by the law reform commissions in British Columbia[336] and the Australian Capital Territory,[337] that the court should not have the power to appoint a substitute attorney.[338] One of the fundamental characteristics of an EPA is that the donor personally selects the attorney, and presumably has trust and confidence in that person. This key element is missing when the court appoints a substitute attorney. The appointment is a reflection of the court's assessment, not the donor's, of who is a suitable attorney. Moreover, not only does an EPA represent the donor's personal choice of attorney, it also reflects the donor's desire to provide for his or her own incapacity without court intervention. This too is missing when a substitute attorney is appointed.

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[333] N.S.W. Act, s. 163G (application by donor only); N. Territory Act, s. 15(2); South Australia Act, s. 11(1) [am. 1988, No. 80, s. 3]; Tasmania Act, s. 11E. In South Australia, the application may be brought prior to the donor's incapacity.

[334] *Supra*, note 328 and accompanying text.

[335] There are other circumstances in which substitution may be used. For example, some jurisdictions provide that the attorney's death does not terminate the EPA, but merely creates a "vacancy" which the court can fill by the appointment of a substitute attorney - see *infra*, at 102.

[336] B.C. Report at 22.

[337] Australian Report at 19.

[338] This view was also expressed by the Newfoundland Law Reform Commission in its working paper, but the Commission retracted this in its final report, concluding that its tentative view was too inflexible and would cause too much inconvenience - see Newfoundland Report at 49-53.

We believe that it is both artificial and inappropriate for the court to continue an EPA once the original attorney has been removed. At this point the essential elements of the EPA - the donor's personal selection of the attorney, and the donor's desire to avoid court intervention - have been destroyed. In our view it is these elements that justify our previous recommendations that the attorney not be subject to the safeguards imposed by the *Dependent Adults Act*, such as mandatory accounting[339] and restrictions on authority.[340] We believe that, if the attorney is removed, the EPA should come to an end, and the donor's affairs should be dealt with by means of a trusteeship order.

We conclude, therefore, that the court should not have the power to appoint a substitute attorney. However, the proposed legislation should make provision for the void which a termination order will create. Accordingly, we propose that, if a termination order is granted, the court may direct the applicant or the Public Trustee to bring an application forthwith under the *Dependent Adults Act* for a trusteeship order in respect of the donor's estate,[341] and pending that application may appoint an interim trustee of the donor's estate.

RECOMMENDATION 29

We recommend that the proposed legislation provide that, if a termination order is granted as provided in Recommendation No. 28,

(a) the Court shall not appoint a substitute attorney,

(b) the Court may direct the applicant or the Public Trustee to bring an application forthwith under the *Dependent Adults Act* for a trusteeship order in respect of the donor's estate, and

(c) pending the application referred to in paragraph (b), the Court may appoint an interim trustee of the donor's estate with such powers as the Court considers appropriate.

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[339] See *supra*, at 72.

[340] See *supra*, at 75.

[341] Even in the absence of this direction, the Public Trustee would have a duty to make the application if the Public Trustee was of the opinion that no person was willing, able and suitable to make the application - see *Dependent Adults Act*, s. 33 [am. 1985, c. 21, s. 29].

(3) Variation

Several jurisdictions empower the court to vary the terms of an EPA.[342] Having rejected the concept of substitution, we believe that it necessarily follows that the court should not have the power to vary the terms of an EPA; for example, to impose a limitation on the attorney's authority, or to remove a limitation imposed by the donor. To empower the court to amend some provisions of the EPA, but not the most important one (the selection of the attorney), would be illogical. In our view if the terms of the EPA are no longer sufficient to protect the interests of the donor, and the donor lacks the mental capacity to vary it, the appropriate course of action is to apply under the *Dependent Adults Act* for a trusteeship order.

RECOMMENDATION 30

We recommend that the proposed legislation should not provide that the Court may vary the terms of an enduring power of attorney.

C. Renunciation by the Attorney

At common law an attorney is free to renounce the appointment, and the renunciation takes effect upon notice to the donor.[343] In our view this right should be restricted if the donor is mentally incapable of managing his or her affairs. We do not believe that it is justifiable to allow the attorney to leave the donor's estate "in limbo" by renouncing the appointment. This view is reflected in our earlier recommendation that, after the incapacity of the donor, the attorney should have a statutory duty to act to protect the donor's interests.[344]

We propose, therefore, that whenever an attorney becomes subject to the statutory duty to act, as provided in our previous recommendation, the attorney should not be able to renounce without leave of the court.[345] In our view an application for leave to renounce should be deemed to be an application for a termination order. This will ensure that the same notice requirements and criteria (best interests of the donor) apply,[346] and that, if the court grants the order, it may direct the applicant or the Public Trustee to bring an application under the *Dependent Adults Act* for a trusteeship order in respect of the donor's estate.[347]

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[342] New Brunswick Act, s. 58.4; English Act, s. 8(2); N. Ireland Order, s. 10(2); New Zealand Act, s. 102(2)(d); N.S.W. Act, s. 163G; N. Territory Act, s. 15(2); South Australia Act, s. 11(1) [am. 1988, No. 80, s. 3]; Tasmania Act, s. 11E.

[343] See Bowstead, *supra*, note 31 at article 128; Fridman, *supra*, note 131 at 349; Halsbury's Laws of England (4th ed.), vol. 1, para. 879.

[344] *Supra*, Recommendation No. 20.

[345] For similar provisions in other jurisdictions see N. Territory Act, s. 15(1); South Australia Act, s. 9; English Act, s. 2(12); N. Ireland Order, s. 4(11); New Zealand Act, s. 104.

RECOMMENDATION 31

We recommend that the proposed legislation provide that:

(a) Subject to paragraph (b), an enduring power of attorney terminates upon the attorney renouncing the appointment and giving notice of the renunciation to the donor.

(b) During any period in which an attorney is subject to the duty referred to in Recommendation No. 20, the attorney shall not renounce the appointment without leave of the Court.

(c) An application for leave to renounce shall be deemed to be an application for a termination order as provided in Recommendation No. 28.

D. Trusteeship by Court Order

(1) Effect on the EPA

Every Canadian province which has EPA legislation provides that an EPA terminates if the court grants a trusteeship order in respect of the donor's estate.[348]

The approach adopted in the United States tends to be different. Most States have modelled their EPA legislation on the Uniform D.P.A. Act, which provides that a trusteeship order does not automatically terminate an EPA. Instead, the attorney becomes accountable to the trustee, and the trustee can revoke or amend the EPA.[349] The Law Reform Commission of British Columbia has recently recommended the adoption of this model.[350]

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[346] See *supra*, Recommendation No. 28.

[347] See *supra*, Recommendation No. 29.

[348] B.C. Act, s. 7(2); Saskatchewan Act, s. 4; Manitoba Act, s. 3(2); Ontario Act, s. 8 [am. 1983, c. 74, s. 2]; New Brunswick Act, s. 58.3; Nova Scotia Act, s. 4; P.E.I. Act, s. 8.

[349] Uniform D.P.A. Act, s. 3(a). See also American College of Probate Counsel, *supra*, note 30.

[350] B.C. Working Paper at 20-2 and 27-8.

The position in Australia highlights the range of options available. South Australia adopts the Uniform D.P.A. model - the attorney becomes accountable to the trustee.[351] The Northern Territory follows the Canadian approach in a slightly modified form - the EPA is automatically terminated in respect of property which is subject to the trusteeship order.[352] In New South Wales the EPA is "suspended" by the trusteeship order, and the court can terminate it or restore it on such terms and conditions as the court thinks fit.[353] The Tasmania Act provides that an EPA is not terminated by a trusteeship order, and that the powers and duties of the trustee do not apply to the donor's estate so long as the EPA is in force.[354] The court can, however, terminate the EPA on the application of any interested person.[355]

We do not favour the Uniform D.P.A. model or the alternative options reflected in the Australian legislation. We believe that an EPA should terminate if a trusteeship order is granted. To provide that the EPA continues, but that the attorney becomes accountable to the trustee and the trustee can revoke the power, would create unnecessary complexity and duplication, as well as potential conflict. We do not think that it is either sensible or practicable to confer authority on a trustee to manage the donor's affairs, while at the same time allowing the attorney's authority to continue. It is likely that most trustees would agree, and would exercise their power to revoke the EPA.[356]

It is important to bear in mind that a trusteeship order is not granted purely on the basis of the person being unable to make reasonable judgments concerning his or her estate. Before granting the order, the court must also be satisfied that the person needs a trustee and that the order would be in his or her best interests.[357] If that person's affairs are being properly managed by an attorney under an EPA, the donor does not need a trustee, and the statutory criteria for a trusteeship order are not satisfied. Conversely, if the court concludes that the donor does need a trustee, this indicates that the donor's interests are not being adequately protected by the EPA, and in our view it follows from this that the EPA should come to an end.

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[351] South Australia Act, s. 10.

[352] N. Territory Act, s. 18. In 1988 the Act was amended [1988, c. 42, s. 3] to provide that an EPA is not revoked by the appointment of a guardian under the *Adult Guardianship Act*. But this refers to guardianship of the person, not property.

[353] *Protected Estates Act* 1983, No. 179, s. 76.

[354] Tasmania Act, s. 11D.

[355] *Id.* s. 11E(1).

[356] The B.C. Working Paper (at 21) notes that the "only advantage offered by the American approach is to give the [trustee] a degree of control over the timing of the termination of the power of attorney."

[357] *Dependent Adults Act*, s. 25.

RECOMMENDATION 32

We recommend that the proposed legislation provide that an enduring power of attorney terminates upon a trusteeship order being granted under the *Dependent Adults Act* in respect of the donor's estate.

(2) Amendments to the *Dependent Adults Act*

In view of the preceding recommendation, we believe that certain consequential amendments should be made to the *Dependent Adults Act*. First, the Act should be amended to require that the attorney be served with notice of an application for a trusteeship order, a copy of the order if granted, and notice of appeal if any. Second, we believe that the Act should contain an express provision that the court shall have regard to the existence of the EPA in deciding whether the donor needs a trustee and whether the trusteeship order would be in the donor's best interests.

A third amendment relates to guardianship orders under the Act. Although a guardian does not have authority over the dependent adult's estate, some of the decisions which the guardian may be authorized to make may have an impact on the estate; for example, a decision that the dependent adult should reside in a private nursing home. Accordingly, we propose that the attorney under an EPA should be served with a copy of any application for a guardianship order in respect of the donor, a copy of the order if granted, notice of appeal if any, and notice of any application for review of the order.[358]

RECOMMENDATION 33

We recommend that the *Dependent Adults Act* be amended to provide that:

(a) Where an application is made for a trusteeship order in respect of the estate of the donor of an enduring power of attorney,

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[358] The interest which the manager of the estate may have in guardianship proceedings is reflected in the fact that the *Dependent Adults Act* requires the trustee of a dependent adult to be served with notice of any guardianship proceedings - see ss. 3(2)(f), 15(2)(f), and 68(2).

(i) the attorney shall be served with a copy of the application, a copy of the trusteeship order if granted, and notice of appeal if any, and

(ii) the Court shall have regard to the existence of the enduring power of attorney in deciding whether the donor needs a trustee and whether the trusteeship order would be in the donor's best interests.

(b) An attorney under an enduring power of attorney must be served with a copy of any application for a guardianship order in respect of the donor, a copy of the order if granted, notice of appeal if any, and notice of any application for review of the order.

E. Trusteeship Without Court Order

The *Dependent Adults Act* provides a procedure for trusteeship without an order of the court.[359] If two physicians examine a person who is resident in a designated "facility", and are of the opinion that the person is unable to make reasonable judgments with respect to all or any matters pertaining to his or her estate, they may issue a certificate of incapacity. If a certificate is issued, the Public Trustee automatically becomes trustee of the estate of the person named in the certificate.

We believe that a certificate of incapacity should not terminate an EPA, nor should the Public Trustee become the donor's trustee.[360] We view this situation as very different from trusteeship by court order. As we discussed above,[361] when an application is made to the court for a trusteeship order, the court must consider whether, having regard to the existence of the EPA, the donor needs a trustee. This provides a necessary safeguard to ensure that a trusteeship order is not granted if the EPA is adequately protecting the donor's interests.

This safeguard does not apply where trusteeship arises by virtue of a certificate of incapacity, because the court is not involved in the process. The decision to issue a certificate of incapacity is left to the discretion of the two examining physicians. In our view the physicians are not in a position to determine whether, having regard to the existence of the EPA, the donor needs a trustee. They may not know that the donor has granted an EPA; even if they do, they are unlikely to have access to information concerning the scope of the EPA and the conduct of the attorney in order to assess whether the EPA is adequately protecting the donor's interests. Moreover, we do not believe that it is appropriate that physicians should make that assessment, nor is it reasonable to expect them to do so. As a result, it is likely that certificates of incapacity would be issued in many cases where the existence of an EPA makes trusteeship unnecessary.

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[359] *Id.* Part 4.

[360] In Ontario and Nova Scotia the EPA may contain a provision to this effect - see Ontario Act, ss. 5a [en. 1983, c. 74, s. 1], 8 [am. 1983, c. 74, s. 2]; Nova Scotia Act, s. 6. In New Brunswick, the Mental Health Act, R.S.N.B. 1973, c. M-10, s. 38(3) [re-en. 1987, c. 44, s. 2(1)] provides that the Administrator of Estates does not become the committee of that part of the donor's estate to which the EPA applies.

[361] *Supra*, at 98-9.

We propose, therefore, that the *Dependent Adults Act* be amended to provide that, if at the time a certificate of incapacity is issued, there exists an EPA granted by the person named in the certificate, the certificate is of no effect and the Public Trustee does not become trustee of the donor's estate. We do not believe that this proposal creates any real risk to the donor. On receiving the certificate, if the Public Trustee has reason to believe that the donor's interests are not being adequately protected by the EPA, the Public Trustee can apply to the court for a trusteeship order.[362]

Certain consequential amendments to the *Dependent Adults Act* are also necessary in light of our recommendation. Section 52(6) of the Act provides that notwithstanding that a certificate of incapacity is of no effect if a trusteeship order exists, any action taken by the Public Trustee in the belief that no trusteeship order exists is as valid as if it had been done pursuant to a certificate of incapacity and as if no trusteeship order had been in existence. We believe that this provision should also apply to a certificate issued when an EPA exists.

The Act requires the Public Trustee, on receipt of a certificate of incapacity, to give a written statement to the person named in the certificate and to the person's guardian or nearest relative if there is no guardian.[363] The statement explains certain matters such as the effect of the certificate and the right of appeal. We anticipate that in many (perhaps most) cases the Public Trustee, on receiving the certificate, will not know whether the person named in the certificate has granted an EPA. Accordingly, we believe that the written statement which the Public Trustee is required to give should explain that the certificate of incapacity has no effect if an EPA is in existence but that the Public Trustee may manage the estate until notified of the EPA.

RECOMMENDATION 34

We recommend that the *Dependent Adults Act* be amended to provide that:

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[362] Indeed, the Public Trustee may have a duty to do so - see *supra*, note 341.

[363] S. 58(1).

(a) If at the time a certificate of incapacity is issued, there exists an enduring power of attorney granted by the person named in the certificate, the certificate is of no effect and the Public Trustee does not become trustee of the donor's estate.

(b) Notwithstanding paragraph (a), any action taken by the Public Trustee in the belief that no enduring power of attorney exists is as valid as if it had been done pursuant to a certificate of incapacity and as if no enduring power of attorney had been in existence.

(c) The written statement which the Public Trustee is required to give under section 58(1) must explain that the certificate of incapacity has no effect if there exists an enduring power of attorney granted by the person named in the certificate prior to the certificate being issued, but that the Public Trustee may manage the estate until notified of the enduring power of attorney.

F. Other Instances of Termination

(1) Death of the Donor or Attorney

We consider it self-evident that an EPA should terminate on the death of the donor, except in cases of irrevocable powers of attorney.[364] This is the position at common law,[365] and we propose that it be codified in the legislation.

It is not so self-evident that an EPA should terminate if the attorney dies. For example, in some jurisdictions the court may appoint a substitute attorney if the original attorney dies.[366] However, in view of our previous recommendation that the court should not have the power to appoint a substitute attorney,[367] we conclude that an EPA should terminate on the death of the attorney.[368]

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[364] See *infra*, at 105.

[365] See e.g. *McCallum* v. *Trans North Turbo Air (1971) Ltd.* (1978) 8 C.P.C. 1 (N.W.T.S.C.); *MacKenzie* v. *Carroll* (1974) 53 D.L.R. (3d) 699 (Ont. H.C.); Bowstead, *supra*, note 31 at article 126.

[366] N.S.W. Act, s. 163G. The substitution provision in the Ontario Act (s. 10) does not specify the circumstances in which the court may appoint a substitute, but the section is wide enough to apply where the attorney dies, and this was certainly the intention of the Ontario Law Reform Commission - see Ontario Report at 26. For provisions similar to s. 10 of the Ontario Act see New Brunswick Act, s. 58.6; Nova Scotia Act, s. 7(1)(c); P.E.I. Act, s. 10.

[367] *Supra*, at 94-5.

[368] The position if there are joint or alternate attorneys is discussed *infra*, at 104.

RECOMMENDATION 35

We recommend that the proposed legislation provide that an enduring power of attorney terminates upon the death of the donor or the attorney.

(2) Bankruptcy

We do not view bankruptcy of the donor as incompatible with the continuation of the attorney's authority. That authority would of course be subject to the powers of the trustee in bankruptcy. But it is probably in the best interests of the donor to have the attorney's authority continue, so as to enable the attorney to make decisions on the donor's behalf in relation to matters connected with the bankruptcy. We therefore recommend that an EPA should not terminate upon the bankruptcy of the donor.

Whether it would be in the best interests of the donor to allow the attorney's authority to continue after the attorney has become bankrupt is, in our view, a question which should be left to the donor or interested persons to decide. If the donor is still mentally capable, he or she can revoke the EPA on the bankruptcy of the attorney. If the donor lacks the capacity to revoke the EPA, interested persons can bring an application for a termination order or a trusteeship order.[369] We recommend, therefore, that bankruptcy of the attorney should not result in automatic termination of the EPA.

RECOMMENDATION 36

We recommend that the proposed legislation should not provide that an enduring power of attorney terminates upon the bankruptcy of the donor or the attorney.

(3) Incapacity of the Attorney

If attorneys lack the mental capacity to manage their own affairs, we do not believe that they should continue to have authority to manage the donor's. Accordingly, we propose that an EPA should terminate upon the attorney becoming subject to a trusteeship order or a certificate of incapacity under the *Dependent Adults Act*.

RECOMMENDATION 37

We recommend that the proposed legislation provide that an enduring power of attorney terminates upon a trusteeship order being granted or a certificate of incapacity being issued in respect of the attorney's estate.

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[369] See *supra*, at 91-4 and 97-9.

The preceding recommendation creates a potential void in the management of the donor's affairs. We propose that this be addressed by amending the *Dependent Adults Act* to empower the court, on granting a trusteeship order in respect of the attorney's estate, to direct the applicant or the Public Trustee to apply for an order appointing a trustee on behalf of the donor, if the court has reason to believe that the donor may be unable to make reasonable judgments in respect of matters relating to all or part of his or her estate.

RECOMMENDATION 38

We recommend that the *Dependent Adults Act* be amended to provide that, on granting a trusteeship order in respect of the estate of an attorney under an enduring power of attorney, the Court may direct the applicant or the Public Trustee to apply for an order appointing a trustee on behalf of the donor of the power, if the Court has reason to believe that the donor may be unable to make reasonable judgments in respect of matters relating to all or part of his or her estate.

G. Joint and Alternate Attorneys

Our recommendations with respect to the attorney's renunciation, death, and mental incapacity have assumed that the EPA appoints only one attorney. However, donors may decide to appoint more than one attorney, with joint and several authority, or to appoint an alternate who is to take over, for example, in the event of the death of the original attorney. We believe that our recommendations with respect to termination should be modified to take account of joint and several attorneys and alternate attorneys.

We propose, therefore, that where an EPA appoints more than one attorney (each with joint and several authority) or provides for alternate attorneys (the appointment of one being conditional upon the cessation of the appointment of another), any reference to "the attorney" in our recommendations with respect to termination should be interpreted as a reference to the last remaining attorney.[370]

RECOMMENDATION 39

We recommend that the proposed legislation provide that, where an enduring power of attorney appoints more than one attorney, each with joint and several authority, or provides for alternate attorneys, the appointment of one being conditional upon the cessation of the appointment of another, references in the legislation to "the attorney" in relation to termination of the power shall be interpreted as a reference to the last remaining attorney.

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[370] This wording is modeled on the New Zealand Act, s. 106.

H. Irrevocable Powers of Attorney

At common law a power of attorney which is expressed to be irrevocable, and is given to secure a proprietary or other interest of the attorney, is irrevocable.[371] It cannot be revoked by the donor without the consent of the attorney, nor is it terminated by the incapacity or death of the donor or the attorney. We do not intend that our recommendations with respect to termination of an EPA should apply to irrevocable powers, and we propose that the legislation make this clear.

RECOMMENDATION 40

We recommend that the proposed legislation provide that its provisions relating to termination of an enduring power of attorney do not apply to irrevocable powers of attorney.

I. Waiver

We believe that the statutory provisions relating to termination should apply notwithstanding any agreement or waiver to the contrary.[372] We recommended a non-waiver provision in relation to the formalities of execution[373] and the right to apply for an accounting,[374] and in our view the same reasoning applies to waiver in the context of termination.

RECOMMENDATION 41

We recommend that the proposed legislation provide that its provisions relating to termination of an enduring power of attorney apply notwithstanding any agreement or waiver to the contrary.

J. Protection of Attorneys and Third Parties

Termination of a power of attorney (not just an EPA) creates the possibility of the attorney and third parties acting without knowledge of the termination. The extent to which the law should afford protection in this situation is discussed in Chapter 8.

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[371] See *supra*, note 31.

[372] For non-waiver provisions in other jurisdictions see Ontario Act, s. 4; New Brunswick Act, s. 58.7; P.E.I. Act, s. 4; Tasmania Act, s. 11F.

[373] *Supra*, at 52.

[374] *Supra*, at 74.

CHAPTER 8 - PROTECTION OF ATTORNEYS AND THIRD PARTIES

A. Liability of the Attorney

As we discussed in Chapter 2,[375] the English Court of Appeal decision in *Yonge* v. *Toynbee*[376] stands for the proposition that attorneys who act after their authority has been terminated by reason of the donor's mental incapacity are personally liable to third parties for breach of the implied warranty of authority, even if the attorney is unaware of the donor's incapacity.

We noted that the validity of the rule in *Yonge* v. *Toynbee* is questionable.[377] However, in the absence of Canadian authority on point, it is possible that the decision might be followed by our courts. Most provinces have foreclosed that possibility by overruling the decision in their EPA legislation.[378] We believe that Alberta should do likewise.

Not only is *Yonge* v. *Toynbee* unsound in principle, it is also manifestly unfair. It results in attorneys who act in good faith, without knowledge of the donor's incapacity, being held personally liable to third parties with whom they deal, even although the rights of these third parties are unaffected by the donor's incapacity.[379] The unfairness is compounded by the difficulties which often face attorneys in trying to ascertain whether their authority has been terminated. The Ontario Law Reform Commission noted that:[380]

> It is apparent that the law is in an unsatisfactory state. In the late nineteenth and early twentieth century when the rule was formulated that the subsequent insanity of the donor

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[375] *Supra*, at 15.

[376] *Supra*, note 50.

[377] *Supra*, at 15.

[378] B.C. Act, s. 3 [re-en. 1987, c. 42, s. 90, in force Oct. 14, 1987, Reg. 371/87]; Manitoba Act, s. 2(2); New Brunswick Act, s. 58(1) [re-en. 1989, c. 31, s. 1]; Nova Scotia Act, s. 3(1); P.E.I. Act, s. 3(1); Ontario Act, s. 3(1) [am. 1986, c. 49, s. 1]; Saskatchewan Act, s. 2(2); see also U.L.C.C. Act, s. 1(2). A similar provision is also found in many other jurisdictions - see N.S.W. Act, s. 162; N. Territory Act, s. 21; South Australia Act, s. 12(2); Powers of Attorney Act 1971, c. 27, s. 5 (England).

[379] See *supra*, at 14.

[380] Ontario Report at 14. The same point is made in the Manitoba Report (at 7) and the South Australia Report (at 10).

> revoked the agent's authority, there was a clear-cut test of insanity, and that was evidenced by the person being certified. Today, the question of whether or not a person is *compos mentis* is a much more difficult one to answer. As a result, considerable practical difficulties are created for attorneys. These can and should be eliminated.

EPA legislation in itself will go some way to remedy the problem. The donor's mental incapacity will not terminate the attorney's authority, and thus the attorney will not be liable for breach of the implied warranty of authority. However, the possibility of personal liability remains in cases where, either through the donor's choice or through inadvertent non-compliance with EPA requirements,[381] the power of attorney is not an enduring one. Also, the rule enunciated in *Yonge* v. *Toynbee* is wide enough to apply to cases where the attorney's authority is terminated by some cause other than the donor's mental incapacity; for example, death of the donor. In our view the proposed EPA legislation should contain a provision which ensures that the rule in *Yonge* v. *Toynbee* has no application to powers of attorney in Alberta.

RECOMMENDATION 42

We recommend that the proposed legislation provide that an attorney shall not incur any liability to the donor or to any other person for having acted in pursuance of a power of attorney which has been terminated, if the attorney did not know, and with the exercise of reasonable care would not have known, of the termination.

B. Third Parties

We have seen that, where the attorney's authority is terminated by the donor's mental incapacity, the donor remains liable to third parties who have no knowledge of the incapacity when dealing with the attorney.[382]

In most provinces this rule has been codified in the EPA legislation.[383] We see some merit in doing this, even although the common law rule is clear and well established. Indeed, a statutory provision may well be necessary in view our preceding recommendation. If the EPA legislation contains a provision protecting attorneys, but makes no mention of third parties, this omission may possibly be interpreted as changing the common law rule with respect to third parties. For that reason, our view is that the EPA legislation ought to codify the common law regarding the position of third parties who act after the attorney's authority has been terminated.

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[381] See *supra*, at 51.

[382] *Supra*, at 14.

[383] B.C. Act, s. 4 [re-en. 1987, c. 42, s. 90, in force Oct. 14, 1987, Reg. 371/87]; Manitoba Act, s. 2(1); New Brunswick Act, s. 58(1) [re-en. 1989, c. 31, s. 1]; Nova Scotia Act, s. 3(2); P.E.I. Act, s. 3(1); Ontario Act, s. 3(1) [am. 1986, c. 49, s. 1]; Saskatchewan Act, s. 2(1); see also U.L.C.C. Act, s. 1(1). A similar provision is also found in many other jurisdictions - see N.S.W. Act, s. 161; N. Territory Act, s. 20; South Australia Act, s. 12(1); Powers of Attorney Act 1971, c. 27, s. 5 (England).

C. Fourth Parties

In 1987 the legislation in British Columbia was amended to include a provision dealing with the position of the innocent "fourth party", that is, someone (for example, a purchaser) whose rights are dependent upon the validity of a transaction between the attorney and a third party. The B.C. provision is as follows:[384]

> Where the authority of an agent to act on behalf of his principal has been terminated, but
>
> (a) the agent purporting to act for the principal enters into a transaction with a person (called in this section "the intermediate party"),
>
> (b) the rights of another person (called in this section "the stranger") are dependent on the validity of the transaction entered into by the agent with the intermediate party, and
>
> (c) the stranger had, at the material time, no knowledge of the termination of the authority of the agent,
>
> then, for the purpose of determining the legal rights and obligations of the principal in relation to the stranger, the intermediate party shall be conclusively deemed to have had no knowledge of the termination.

Whilst we agree with the aims of this provision, we feel that they can be achieved in a much simpler fashion. The U.L.C.C. Act,[385] and the provincial legislation which is identical to it,[386] provide that an act by the attorney in favour of a person who does not know of the termination of authority is valid and binding in favour of that person "and in favour of a person claiming under him". This wording is preferable to the more elaborate B.C. provision, but the term "claiming under him" is unduly restrictive.[387] Also, the U.L.C.C. provision refers only to the knowledge of the party who deals with the attorney, and thus it may afford protection to fourth parties even if they know of the termination of authority.

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[384] B.C. Act, s. 4(3) [en. 1987, c. 42, s. 90, in force Oct. 14, 1987, Reg. 371/87]. For similar provisions see the English Act, s. 9(4); N. Ireland Order, s. 11(4); N.S.W. Act, s. 162.

[385] S. 1(1).

[386] Manitoba Act, s. 2(1); Saskatchewan Act, s. 2(1).

In our view the best approach is to provide that the attorney's act is valid and binding in favour of any person who did not know of the termination of the attorney's authority. This will protect both third and fourth parties, provided that they are unaware of the termination of authority.

RECOMMENDATION 43

We recommend that the proposed legislation provide that where a power of attorney is terminated, any subsequent exercise of the power by the attorney is valid and binding in favour of any person who did not know, and with the exercise of reasonable care would not have known, of the termination.

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[387] See the discussion in the Newfoundland Report at 18-9.

PART III - SUMMARY OF RECOMMENDATIONS

Recommendation 1

We recommend that legislation be introduced to enable a power of attorney to be granted which will continue notwithstanding any subsequent mental incapacity or infirmity of the donor.

[Draft Act, s. 4]

Recommendation 2

We recommend that the proposed legislation require that an enduring power of attorney be in writing and (subject to recommendation No. 3) be signed by the donor.

[Draft Act s. 2(1)(a)]

Recommendation 3

We recommend that the proposed legislation provide that an enduring power of attorney may be signed on the donor's behalf, in the presence and under the direction of the donor, by a person other than the attorney, a witness, or the spouse of the attorney or witness, if the donor is physically incapable of signing it.

[Draft Act s. 2(2)]

Recommendation 4

We recommend that the proposed legislation should not require an enduring power of attorney to be signed or acknowledged by the attorney.

Recommendation 5

We recommend that the proposed legislation require the execution of an enduring power of attorney to be witnessed by a lawyer as set out in Recommendation No. 7.

[Draft Act s. 2(3)]

Recommendation 6

We recommend that the proposed legislation require that an enduring power of attorney contain a statement indicating either that it is to continue notwithstanding the donor's subsequent mental incapacity or infirmity, or that it is to take effect upon the mental incapacity or infirmity of the donor.

[Draft Act s. 2(1)(b)]

Recommendation 7

We recommend that the proposed legislation require that an enduring power of attorney be accompanied by a certificate of legal advice in prescribed form, signed by a lawyer who is not the attorney or the attorney's spouse (including "common law" spouse), stating that:

(a) the donor attended before the lawyer providing the certificate;

(b) the donor appeared competent to grant the power of attorney;

(c) (i) the donor signed the power of attorney (or acknowledged his or her signature) in the presence of the lawyer, and acknowledged having signed voluntarily, or

(ii) the power of attorney was signed on behalf of the donor as provided in Recommendation No. 3, in the presence of the lawyer and the donor, and the donor acknowledged that he or she was physically incapable of signing and that his or her direction to sign was given voluntarily; and

(d) the lawyer satisfied himself or herself that the donor understood the explanatory notes referred to in Recommendation 8.

[Draft Act ss. 2(1)(d), 2(3)]

Recommendation 8

We recommend that the proposed legislation require every enduring power of attorney to include a series of explanatory notes, setting out the essential nature and effect of the instrument.

[Draft Act s. 2(1)(c)]

Recommendation 9

We recommend that the explanatory notes referred to in Recommendation No. 8 be as follows:

NOTES ON THE ENDURING POWER OF ATTORNEY

Read These Notes Before Signing This Document

1. The effect of this document is to authorize the person you have named as your attorney to act on your behalf with respect to your property and financial affairs.

2. Unless you state otherwise in the document, your attorney will have very wide powers to deal with your property on your behalf. The attorney will also be able to use your property to benefit your spouse and dependent children. You should consider very carefully whether or not you wish to impose any restrictions on the powers of your attorney.

3. This document is an "enduring" power of attorney, which means that it will not come to an end if you become mentally incapable of managing your own affairs. At that point your attorney will have a duty to manage your affairs, and will not be able to resign without first obtaining permission from the court. The power of attorney comes to an end if you or your attorney dies.

4. This document takes effect as soon as it is signed and witnessed. If you do not want your attorney to be able to act on your behalf until after you become mentally incapable of managing your own affairs, you should state this in the document.

5. You can cancel this power of attorney at any time, so long as you are still mentally capable of understanding what you are doing.

6. You should ensure that your attorney knows about this document and agrees to being appointed as attorney.

[Draft Act Schedule]

Recommendation 10

We recommend that the proposed legislation provide that the prescribed formalities apply only to enduring powers of attorney, and that failure to comply with these formalities should not in itself prevent an otherwise valid instrument from being a power of attorney (albeit a non-enduring one).

[Draft Act s. 2(1)]

Recommendation 11

We recommend that the proposed legislation should provide that the prescribed formalities apply notwithstanding any agreement or waiver to the contrary.

[Draft Act s. 2(5)]

Recommendation 12

We recommend that the proposed legislation provide that, notwithstanding the formalities of execution prescribed in the legislation, an instrument is an enduring power of attorney if, according to the law of the place where it is executed,

(a) it is a valid power of attorney, and

(b) the attorney's authority thereunder is not terminated by the subsequent mental incapacity or infirmity of the donor.

[Draft Act s. 2(4)]

Recommendation 13

We recommend that the proposed legislation should not impose a mandatory registration requirement for enduring powers of attorney.

Recommendation 14

We recommend that the proposed legislation provide that an enduring power of attorney is void if, at the date of its execution, the donor is mentally incapable of understanding its nature and effect.

[Draft Act s. 3]

Recommendation 15

We recommend that the proposed legislation should not prescribe a minimum age for donors of enduring powers of attorney.

Recommendation 16

We recommend that the proposed legislation should not place any restrictions on who can be appointed as an attorney under an enduring power of attorney.

Recommendation 17

We recommend that the proposed legislation should not require that an enduring power of attorney appoint a minimum of two attorneys.

Recommendation 18

We recommend that the proposed legislation should not place a financial limit on the value of estates which can be the subject of an enduring power of attorney.

Recommendation 19

We recommend that the proposed legislation should not place a time limit on the duration of enduring powers of attorney.

Recommendation 20

We recommend that the proposed legislation provide that where an attorney has acted in pursuance of an enduring power of attorney, or has otherwise indicated acceptance of the appointment, and the power of attorney has not been terminated, the attorney has a duty (unless the power of attorney provides otherwise) to exercise his or her powers to protect the donor's interests during any period in which the attorney knows, or ought to know, that the donor is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate.

[Draft Act s. 8]

Recommendation 21

We recommend that the proposed legislation provide that:

(a) The donor of an enduring power of attorney, or the donor's personal representative or trustee appointed under the *Dependent Adults Act*, may apply to the Surrogate Court by way of originating notice for an order directing the attorney to bring in and pass accounts in respect of any or all transactions entered into in pursuance of the power of attorney.

(b) An application referred to in paragraph (a) may also be brought by any interested person, and by any other person with leave of the Court, if the donor is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate.

(c) A copy of the application and order shall be served on the donor (unless the Court dispenses with this requirement), the attorney, and the Public Trustee (unless the person to be served is the applicant).

(d) The Court may grant whatever order for accounting it considers appropriate in the circumstances.

(e) These provisions apply notwithstanding any agreement or waiver to the contrary.

[Draft Act s. 9]

Recommendation 22

We recommend that the proposed legislation provide that an attorney under an enduring power of attorney has authority to do on behalf of the donor anything which the donor can lawfully do by an attorney, subject to any conditions or restrictions in the instrument creating the power.

[Draft Act s. 7(1)]

Recommendation 23

We recommend that the proposed legislation provide that, subject to any conditions, restrictions or additions in the instrument creating the power, an attorney under an enduring power of attorney may exercise his or her authority for the maintenance, education, benefit and advancement of the donor's spouse and dependent children (including the attorney).

[Draft Act s. 7(2)]

Recommendation 24

We recommend that the proposed legislation should not address the issue of ademption of specific legacies resulting from the act of an attorney under an enduring power of attorney.

Recommendation 25

We recommend that the proposed legislation provide that:

(a) An enduring power of attorney may provide that it takes effect at a specified future time or on the occurrence of a specified contingency, including, but not limited to, the mental incapacity or infirmity of the donor.

(b) A power of attorney described in paragraph (a) may name one or more persons on whose written declaration the specified contingency is conclusively deemed to have occurred for the purpose of bringing the power of attorney into effect.

(c) A person referred to in paragraph (b) may be the attorney appointed under the power of attorney.

(d) Where the specified contingency referred to in paragraph (a) relates to the mental incapacity or infirmity of the donor, but

> (1) the power of attorney does not name a person as provided in paragraph (b), or
>
> (2) the named person dies before the power of attorney takes effect,

the specified contingency shall be conclusively deemed to have occurred, for the purpose of bringing the power of attorney into effect, when two medical practitioners declare in writing that it has occurred.

[Draft Act s. 5]

Recommendation 26

We recommend that the proposed legislation provide that, notwithstanding any restriction (whether statutory or otherwise) relating to the release of confidential health care information, where an enduring power of attorney is contingent upon the donor's mental incapacity or infirmity, information concerning the donor's mental and physical health may be released to the extent necessary for the purposes of confirming whether the specified contingency has occurred.

[Draft Act s. 6]

Recommendation 27

We recommend that the proposed legislation provide that an enduring power of attorney terminates if it is revoked by the donor, provided that the donor is capable of understanding the nature and effect of the revocation.

[Draft Act s. 12(1)(a)]

Recommendation 28

We recommend that the proposed legislation provide that:

(a) If the donor of an enduring power of attorney is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate, the donor, any interested person, or any other person with leave of the Court, may apply to the Surrogate Court by way of originating notice for an order terminating the enduring power of attorney.

(b) A copy of the application and order shall be served on the donor (unless the Court dispenses with this requirement), the attorney, and the Public Trustee (unless the person to be served is the applicant).

(c) On hearing an application under paragraph (a), the Court may grant an order terminating the enduring power of attorney if it considers that this would be in the best interests of the donor.

[Draft Act s. 10]

Recommendation 29

We recommend that the proposed legislation provide that, if a termination order is granted as provided in Recommendation No. 28,

(a) the Court shall not appoint a substitute attorney,

(b) the Court may direct the applicant or the Public Trustee to bring an application forthwith under the *Dependent Adults Act* for a trusteeship order in respect of the donor's estate, and

(c) pending the application referred to in paragraph (b), the Court may appoint an interim trustee of the donor's estate with such powers as the Court considers appropriate.

[Draft Act s. 10(4)]

Recommendation 30

We recommend that the proposed legislation should not provide that the Court may vary the terms of an enduring power of attorney.

Recommendation 31

We recommend that the proposed legislation provide that:

(a) Subject to paragraph (b), an enduring power of attorney terminates upon the attorney renouncing the appointment and giving notice of the renunciation to the donor.

(b) During any period in which an attorney is subject to the duty referred to in Recommendation No. 20, the attorney shall not renounce the appointment without leave of the Court.

(c) An application for leave to renounce shall be deemed to be an application for a termination order as provided in Recommendation No. 28.

[Draft Act ss. 11,
12(1)(b)]

Recommendation 32

We recommend that the proposed legislation provide that an enduring power of attorney terminates upon a trusteeship order being granted under the *Dependent Adults Act* in respect of the donor's estate.

[Draft Act s. 12(1)(d)]

Recommendation 33

We recommend that the *Dependent Adults Act* be amended to provide that:

(a) Where an application is made for a trusteeship order in respect of the estate of the donor of an enduring power of attorney,

(i) the attorney shall be served with a copy of the application, a copy of the trusteeship order if granted, and notice of appeal if any, and

(ii) the Court shall have regard to the existence of the enduring power of attorney in deciding whether the donor needs a trustee and whether the trusteeship order would be in the donor's best interests.

(b) An attorney under an enduring power of attorney must be served with a copy of any application for a guardianship order in respect of the donor, a copy of the order if granted, notice of appeal if any, and notice of any application for review of the order.

[Draft DPA Amendment
Act ss. 3-6 and 9]

Recommendation 34

We recommend that the *Dependent Adults Act* be amended to provide that:

(a) If at the time a certificate of incapacity is issued, there exists an enduring power of attorney granted by the person named in the certificate, the certificate is of no effect and the Public Trustee does not become trustee of the donor's estate.

(b) Notwithstanding paragraph (a), any action taken by the Public Trustee in the belief that no enduring power of attorney exists is as valid as if it had been done pursuant to a certificate of incapacity and as if no enduring power of attorney had been in existence.

(c) The written statement which the Public Trustee is required to give under section 58(1) must explain that the certificate of incapacity has no effect if there exists an enduring power of attorney granted by the person named in the certificate prior to the certificate being issued, but that the Public Trustee may manage the estate until notified of the enduring power of attorney.

[Draft DPA Amendment
Act ss. 7-8]

Recommendation 35

We recommend that the proposed legislation provide that an enduring power of attorney terminates upon the death of the donor or the attorney.

[Draft Act s. 12(1)(e)]

Recommendation 36

We recommend that the proposed legislation should not provide that an enduring power of attorney terminates upon the bankruptcy of the donor or the attorney.

Recommendation 37

We recommend that the proposed legislation provide that an enduring power of attorney terminates upon a trusteeship order being granted or a certificate of incapacity being issued in respect of the attorney's estate.

[Draft Act s. 12(1)(f)]

Recommendation 38

We recommend that the *Dependent Adults Act* be amended to provide that, on granting a trusteeship order in respect of the estate of an attorney under an enduring power of attorney, the Court may direct the applicant or the Public Trustee to apply for an order appointing a trustee on behalf of the donor of the power, if the Court has reason to believe that the donor may be unable to make reasonable judgments in respect of matters relating to all or part of his or her estate.

[Draft DPA Amendment
Act s. 6(b)]

Recommendation 39

We recommend that the proposed legislation provide that, where an enduring power of attorney appoints more than one attorney, each with joint and several authority, or provides for alternate attorneys, the appointment of one being conditional upon the cessation of the appointment of another, references in the legislation to "the attorney" in relation to termination of the power shall be interpreted as a reference to the last remaining attorney.

[Draft Act s. 12(2)]

Recommendation 40

We recommend that the proposed legislation provide that its provisions relating to termination of an enduring power of attorney do not apply to irrevocable powers of attorney.

[Draft Act s. 12(1)]

Recommendation 41

We recommend that the proposed legislation provide that its provisions relating to termination of an enduring power of attorney apply notwithstanding any agreement or waiver to the contrary.

[Draft Act s. 12(1)]

Recommendation 42

We recommend that the proposed legislation provide that an attorney shall not incur any liability to the donor or to any other person for having acted in pursuance of a power of attorney which has been terminated, if the attorney did not know, and with the exercise of reasonable care would not have known, of the termination.

[Draft Act s. 13(1)]

Recommendation 43

We recommend that the proposed legislation provide that where a power of attorney is terminated, any subsequent exercise of the power by the attorney is valid and binding in favour of any person who did not know, and with the exercise of reasonable care would not have known, of the termination.

[Draft Act s. 13(2)]

PART IV - DRAFT LEGISLATION

A. Draft *Powers of Attorney Act*

Definitions

1 In this Act,

(a) "attorney" means an attorney under a power of attorney;

(b) "certificate of incapacity" has the same meaning as in the *Dependent Adults Act*;

(c) "Court" means the Surrogate Court of Alberta;

(d) "donor" means the donor of a power of attorney;

(e) "enduring power of attorney" means an enduring power of attorney as defined in section 2;

(f) "spouse" includes parties to a relationship between a man and a woman who are living together on a *bona fide* domestic basis;

(g) "trustee" and "trusteeship order" have the same meaning as in the *Dependent Adults Act*.

Enduring power of attorney

2(1) A power of attorney is an enduring power of attorney if

(a) it is in writing and is signed by the donor,

(b) it contains a statement indicating either that it is to continue notwithstanding the donor's subsequent mental incapacity or infirmity, or that it is to take effect upon the mental incapacity or infirmity of the donor,

(c) it incorporates the explanatory notes set out in the Schedule to this Act, and

(d) it is accompanied by a certificate of legal advice signed by a lawyer who is not the attorney or the attorney's spouse.

(2) Notwithstanding subsection (1)(a), an enduring power of attorney may be signed on the donor's behalf, in the presence and under the direction of the donor, by a person other than the attorney, a witness, or the spouse of the attorney or witness, if the donor is physically incapable of signing it.

(3) The certificate of legal advice referred to in subsection (1)(d) shall be in the prescribed form and shall state that:

(a) the donor attended before the lawyer providing the certificate,

(b) the donor appeared competent to grant the power of attorney,

(c) (i) the donor signed the power of attorney (or acknowledged his or her signature) in the presence of the lawyer, and acknowledged having signed voluntarily, or

(ii) the power of attorney was signed on behalf of the donor as provided in subsection (2), in the presence of the lawyer and the donor, and the donor acknowledged that he or she was physically incapable of signing and that his or her direction to sign was given voluntarily, and

(d) the lawyer satisfied himself or herself that the donor understood the explanatory notes referred to in subsection (1)(c).

(4) Notwithstanding subsection (1), an instrument is an enduring power of attorney if, according to the law of the place where it is executed,

(a) it is a valid power of attorney, and

(b) the attorney's authority thereunder is not terminated by the subsequent mental incapacity or infirmity of the donor.

(5) This section applies notwithstanding any agreement or waiver to the contrary.

Incapacity at execution

3 An enduring power of attorney is void if, at the date of its execution, the donor is mentally incapable of understanding its nature and effect.

Subsequent incapacity

4 An enduring power of attorney is not terminated by the subsequent mental incapacity or infirmity of the donor.

Springing powers

5(1) An enduring power of attorney may provide that it takes effect at a specified future time or on the occurrence of a specified contingency, including, but not limited to, the mental incapacity or infirmity of the donor.

(2) A power of attorney described in subsection (1) may name one or more persons on whose written declaration the specified contingency is conclusively

deemed to have occurred for the purpose of bringing the power of attorney into effect.

(3) A person referred to in subsection (2) may be the attorney appointed under the power of attorney.

(4) Where the specified contingency referred to in subsection (1) relates to the mental incapacity or infirmity of the donor, and

(a) the power of attorney does not name a person as provided in subsection (2), or

(b) the named person dies before the power of attorney takes effect,

the specified contingency shall be conclusively deemed to have occurred, for the purpose of bringing the power of attorney into effect, when two medical practitioners declare in writing that it has occurred.

Release of confidential information

6 Notwithstanding any restriction (whether statutory or otherwise) relating to the disclosure of confidential health care information, where an enduring power of attorney is contingent upon the donor's mental incapacity or infirmity, information concerning the donor's mental and physical health may be disclosed to the extent necessary for the purposes of confirming whether the specified contingency has occurred.

Authority of attorney

7(1) An attorney under an enduring power of attorney has authority to do on behalf of the donor anything which the donor can lawfully do by an attorney, subject to any conditions or restrictions in the instrument creating the power.

(2) Subject to any conditions, restrictions or additions in the instrument creating the power, an attorney under an enduring power of attorney may exercise his or her authority for the maintenance, education, benefit and advancement of the donor's spouse and dependent children (including the attorney).

Duty to act

8 Where

(a) an attorney has acted in pursuance of an enduring power of attorney, or has otherwise indicated acceptance of the appointment, and

(b) the power of attorney has not been terminated, the attorney has a duty (unless the power of attorney provides otherwise) to exercise his or her powers to protect the donor's interests during any period in which the attorney knows, or ought to know, that the donor is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate.

Accounting

9(1) An application may be made to the Court by way of originating notice for an order directing an attorney under an enduring power of attorney to bring in and pass accounts in respect of any or all transactions entered into in pursuance of the power of attorney.

(2) The application may be brought by

(a) the donor, the donor's personal representative, or a trustee of the donor's estate, and

(b) any interested person, and any other person with leave of the Court, if the donor is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate.

(3) A copy of the application and order shall be served on the donor (unless the Court dispenses with this requirement), the attorney, and the Public Trustee (unless the person to be served is the applicant).

(4) On hearing an application under subsection (1), the Court may grant whatever order for accounting it considers appropriate in the circumstances.

(5) This section applies notwithstanding any agreement or waiver to the contrary.

Termination order

10(1) If the donor of an enduring power of attorney is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate, the donor, any interested person, or any other person with leave of the Court, may apply to the Court by way of originating notice for an order terminating the enduring power of attorney.

(2) A copy of the application and order shall be served on the donor (unless the Court dispenses with this requirement), the attorney, and the Public Trustee (unless the person to be served is the applicant).

(3) On hearing an application under subsection (1), the Court may grant an order terminating the enduring power of attorney if it considers that this would be in the best interests of the donor.

(4) On granting an order terminating an enduring power of attorney, the Court

(a) shall not appoint a substitute attorney;

(b) may direct the applicant or the Public Trustee to bring an application forthwith for a trusteeship order in respect of the donor's estate; and

(c) pending the application referred to in clause (b), may appoint an interim trustee of the donor's estate with such powers as the Court considers appropriate.

Renunciation

11(1) During any period in which an attorney is subject to the duty imposed by section 8, the attorney shall not renounce the appointment without leave of the Court.

(2) An application for leave to renounce shall be deemed to be an application under section 10.

Termination of enduring power of attorney

12(1) Except in the case of an irrevocable power of attorney, and notwithstanding any agreement or waiver to the contrary, an enduring power of attorney terminates

(a) if it is revoked by the donor, provided that the donor is mentally capable of understanding the nature and effect of the revocation;

(b) subject to section 11, if the attorney renounces the appointment and gives notice of the renunciation to the donor;

(c) on a termination order being granted pursuant to section 10(3);

(d) on a trusteeship order being granted in respect of the donor;

(e) on the death of the donor or the attorney; and

(f) on a trusteeship order being granted or a certificate of incapacity being issued in respect of the attorney.

(2) Where an enduring power of attorney

(a) appoints more than one attorney, each with joint and several authority, or

(b) provides for alternate attorneys, the appointment of one being conditional upon the cessation of the appointment of another,

references to "the attorney" in subsection (1) shall be interpreted as a reference to the last remaining attorney.

Exercise of power after termination

13(1) An attorney shall not incur any liability to the donor or to any other person for having acted in pursuance of a power of attorney which has been terminated, if the attorney did not know, and with the exercise of reasonable care would not have known, of the termination.

(2) Where a power of attorney is terminated, any subsequent exercise of the power by the attorney is valid and binding in favour of any person who did not know, and with the exercise of reasonable care would not have known, of the termination.

Regulations

14 The Lieutenant Governor in Council may make regulations prescribing the form of the certificate of legal advice referred to in section 2.

SCHEDULE

Section 2(1)(c)

NOTES ON THE ENDURING POWER OF ATTORNEY

Read These Notes Before Signing This Document

1. The effect of this document is to authorize the person you have named as your attorney to act on your behalf with respect to your property and financial affairs.

2. Unless you state otherwise in the document, your attorney will have very wide powers to deal with your property on your behalf. The attorney will also be able to use your property to benefit your spouse and dependent children. You should consider very carefully whether or not you wish to impose any restrictions on the powers of your attorney.

3. This document is an "enduring" power of attorney, which means that it will not come to an end if you become mentally incapable of managing your own affairs. At that point your attorney will have a duty to manage your affairs, and will not be able to resign without first obtaining permission from the court. The power of attorney comes to an end if you or your attorney dies.

4. This document takes effect as soon as it is signed and witnessed. If you do not want your attorney to be able to act on your behalf until after you become mentally incapable of managing your own affairs, you should state this in the document.

5. You can cancel this power of attorney at any time, so long as you are still mentally capable of understanding what you are doing.

6. You should ensure that your attorney knows about this document and agrees to being appointed as attorney.

B. Draft *Dependent Adults Amendment Act*

1 The *Dependent Adults Act* is amended by this Act.

2 Section 1 is amended by adding the following after clause (d):

(d.1) "enduring power of attorney" has the same meaning as in the *Powers of Attorney Act*;

3 Section 3(2) is amended by adding the following after clause (e):

(e.1) any attorney under an enduring power of attorney granted by the person in respect of whom the application is made if he is not the applicant or a person served pursuant to this subsection,

4 Section 15(2) is amended by adding the following after clause (e):

(e.1) any attorney under an enduring power of attorney granted by the dependent adult if he is not the applicant or a person served pursuant to this subsection,

5 Section 22(2) is amended by adding the following after clause (e):

(e.1) any attorney under an enduring power of attorney granted by the person in respect of whom the application is made if he is not the applicant or a person served pursuant to this subsection,

6 Section 25 is amended

(a) by adding the following after subsection (2):

(2.1) In considering the matters referred to in subsections (1)(c) and (2), the Court shall have regard to the existence of any enduring power of attorney granted by the person in respect of whom the application is made.

(b) by adding the following after subsection (3):

(4) If the Court makes an order under this section in respect of an attorney under an enduring power of attorney, and the Court has reason to believe that the donor of that power may be unable to make reasonable judgments in respect of matters relating to all or part of his estate, the Court may direct the applicant or the Public

Trustee to make an application for a trusteeship order in respect of the donor's estate.

7 Section 52 is amended

(a) by adding the following after subsection (1):

(2) A certificate of incapacity is of no effect, and the Public Trustee does not become trustee of the estate of the person named in the certificate, if at the time the certificate is issued there exists an enduring power of attorney granted by the person named in the certificate.

(b) in subsection (6) by adding "or enduring power of attorney" after "trusteeship order" wherever it occurs.

8 Section 58(1) is amended by adding the following after clause (e):

(e.1) a statement explaining that the certificate of incapacity has no effect if there exists an enduring power of attorney granted by the person named in the certificate prior to the certificate being issued, but that the Public Trustee may manage the estate until notified of the enduring power of attorney;

9 Section 68(2) is amended by adding the following after clause (a):

(a.1) any attorney under an enduring power of attorney granted by the dependent adult,

APPENDIX

LIST OF INDIVIDUALS AND ORGANIZATIONS WHO MADE SUBMISSIONS OR WITH WHOM CONSULTATIONS WERE HELD

Alzheimer Society of Calgary	Calgary, Alberta
Alzheimer Society of Edmonton	Edmonton, Alberta
Darcy Anderson, Barrister and Solicitor	Calgary, Alberta
Judy Boyes, Barrister and Solicitor	Calgary, Alberta
Canadian Bar Association, Health Law Subsection (Northern Alberta)	Edmonton, Alberta
Canadian Bar Association, Wills and Estates Subsection (Northern Alberta)	Edmonton, Alberta
Canadian Bar Association, Wills and Trusts Subsection (Southern Alberta)	Calgary, Alberta
Canadian Mental Health Association (Alberta Division)	Edmonton, Alberta
G. Thomas Carter, Barrister and Solicitor	Edmonton, Alberta
Gerald Chipeur, Barrister and Solicitor	Edmonton, Alberta
R.G. Drew, General Counsel, Public Trustee's Office (Alberta)	Edmonton, Alberta
Stephen Fram, Policy Development Division, Ministry of the Attorney General (Ontario)	Toronto, Ontario
R. Stan Galbraith, Barrister and Solicitor	Edmonton, Alberta
Melane Hotz, Public Guardian (Alberta)	Edmonton, Alberta
June Laker, Deputy Public Trustee (B.C.)	Vancouver, B.C.
A.B. MacFarlane, Master of the Court of Protection	London, England
George Monticone, Advocacy Centre for the Elderly	Toronto, Ontario
David Nichols, Scottish Law Commission	Edinburgh, Scotland
Hugh Paisley, Public Trustee (Ontario)	Toronto, Ontario

Premier's Commission on Future Health Care for Albertans	Edmonton, Alberta
Remi G. St. Pierre, Barrister and Solicitor	Edmonton, Alberta
Bernard Starkman, Chairman, Ontario Guardianship and Advocacy Committee	Toronto, Ontario
Judith Wahl, Advocacy Centre for the Elderly	Toronto, Ontario